# DOCKET

No. 07-591

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| Title: | Luis E. Melendez-Diaz, Petitioner<br>v.<br>Massachusetts |
| Docketed: | November 2, 2007 |
| Lower Ct: | Appeals Court of Massachusetts |
| Case Nos.: | (05-P-1213) |
| Decision Date: | July 31, 2007 |
| Discretionary Court Decision Date: | September 26, 2007 |

**Questions Presented**

| ~~~Date~~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Oct 26 2007 | Petition for a writ of certiorari filed. (Response due December 3, 2007) |
| Nov 19 2007 | Waiver of right of respondent Massachusetts to respond filed. |
| Dec 3 2007 | Motion for leave to file amici brief filed by Professors Pamela R. Metzger, et al. (Distributed) |
| Dec 3 2007 | Motion for leave to file amicus brief filed by Richard D. Friedman. (Distributed) |
| Dec 5 2007 | DISTRIBUTED for Conference of January 4, 2008. |
| Dec 6 2007 | Response Requested . (Due January 7, 2008) |
| Dec 27 2007 | Order extending time to file response to petition to and including February 6, 2008. |
| Feb 5 2008 | Brief of respondent Massachusetts in opposition filed. |
| Feb 19 2008 | Reply of petitioner Luis E. Melendez-Diaz filed. (Distributed) |
| Feb 20 2008 | DISTRIBUTED for Conference of March 14, 2008. |
| Mar 17 2008 | Motion for leave to file amicus brief filed by Richard D. Friedman GRANTED. |
| Mar 17 2008 | Motion for leave to file amici brief filed by Professors Pamela R. Metzger, et al. GRANTED. |
| Mar 17 2008 | Petition GRANTED. |
| Apr 23 2008 | The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including June 16, 2008. |
| Apr 23 2008 | The time within which to file respondent's brief on the merits is extended to and including September 2, 2008. |
| May 3 2008 | Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioner |
| Jun 16 2008 | Joint appendix filed (statement of costs received). |
| Jun 16 2008 | Brief of petitioner Luis E. Melendez-Diaz filed. |

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|---|---|
| Jun 23 2008 | Brief amici curiae of Law Professors filed. |
| Jun 23 2008 | Brief amicus curiae of National Innocence Network filed. |
| Jun 23 2008 | Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. |
| Jun 23 2008 | Brief amicus curiae of Richard D. Friedman filed. |
| Aug 8 2008 | CIRCULATED. |
| Aug 18 2008 | SET FOR ARGUMENT ON Monday, November 10, 2008. |
| Aug 20 2008 | Record received from the Appeals Court of Massachusetts. (1 box) |
| Sep 2 2008 | Brief of respondent Massachusetts filed. (Distributed) |
| Sep 9 2008 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Sep 9 2008 | Brief amici curiae of National District Attorneys Association, and District, Prosecuting, and County Attorneys filed. (Distributed) |
| Sep 9 2008 | Brief amicus curiae of United States filed. (Distributed) |
| Sep 9 2008 | Brief amici curiae of Alabama, et al. filed. (Distributed) |
| Sep 12 2008 | Letter, dated September 5, 2008, proposing to lodge non-record materials, namely, three letter responses containing statistics, submitted by counsel for the amici States. |
| Sep 17 2008 | Record received from the Suffolk Superior Criminal Court. (1 envelope) |
| Oct 2 2008 | Reply of petitioner Luis E. Melendez-Diaz filed. (Distributed) |
| Oct 6 2008 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Nov 10 2008 | Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. For respondent: Martha Coakley, Attorney General, Boston, Mass.; and Lisa H. Schertler, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) |

# PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

Luis E. Melendez-Diaz,
*Petitioner,*

v.

Massachusetts

On Petition for a Writ of Certiorari
to the Appeals Court of Massachusetts

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Luis E. Melendez-Diaz respectfully petitions for a writ of certiorari to the Appeals Court of Massachusetts in *Commonwealth v. Melendez-Diaz*, No. 05-P-1213.

## OPINION BELOW

The memorandum and order of the Appeals Court of Massachusetts (App. 1a-10a) is reported at 69 Mass. App. Ct. 1114, 870 N.E.2d 676, and is unpublished. The order of the Massachusetts Supreme Judicial Court denying review (App. 11a) is reported at 449 Mass. 1113, 874 N.E.2d 407. The relevant trial court proceedings and order are unpublished.

## JURISDICTION

The Massachusetts Supreme Judicial Court denied review of this case on September 26, 2007. App. 11a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Chapter 111 of the General Laws of Massachusetts provides in relevant part:

"**§ 12. Analyses of narcotic drugs, poison, drugs, medicines, or chemicals.** The department [of

public health] shall make, free of charge, a chemical analysis of any narcotic drug, or any synthetic substitute for the same, or any preparation containing the same, or any salt or compound thereof, and of any poison, drug, medicine or chemical, when submitted to it by police authorities or by such incorporated charitable organizations in the commonwealth, as the department shall approve for this purpose; provided, that it is satisfied that the analysis is to be used for the enforcement of law.

**§ 13. Certificate of result of analysis of narcotic drugs, poisons, drugs, medicines, or chemicals; evidence:** The analyst or an assistant analyst of the department [of public health] . . . shall upon request furnish a signed certificate, on oath, of the result of the analysis provided for in the preceding section to any police officer or any agent of such incorporated charitable organization, and the presentation of such certificate to the court by any police officer or agent of any such organization shall be prima facie evidence that all the requirements and provisions of the preceding section have been complied with. This certificate shall be sworn to before a justice of the peace or notary public, and the jurat shall contain a statement that the subscriber is the analyst or an assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and net weight of the narcotic or other drug, poison, medicine, or chemical analyzed or the net weight of any mixture containing the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or assistant analyst, and of the fact that he is such."

## INTRODUCTION

This case presents a pressing issue concerning the administration of criminal justice across the country, and over which the federal and state courts are openly and deeply divided: whether state forensic laboratory reports prepared for use in criminal prosecutions are "testimonial" evidence, and thus subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004). The Appeals Court of Massachusetts, following a binding decision from the Massachusetts Supreme Judicial Court, held in this case that they are not.

Until quite recent times, this Court and others generally assumed that the Sixth Amendment required the prosecution, absent a stipulation from a defendant, to present the findings of its forensic examiners through live testimony at trial. *See, e.g.*, *United States v. Wade*, 388 U.S. 218, 227-28 (1967) (forensic analyses of fingerprints, blood and hair samples, etc.); *Diaz v. United States*, 223 U.S. 442, 450 (1912) (autopsy reports); *State v. Henderson*, 554 S.W.2d 117, 120 (Tenn. 1977) (surveying lower courts). However, following this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), which conflated the Confrontation Clause with hearsay law, many states began to exempt crime laboratory reports from the reach of the Sixth Amendment by labeling them as "business records" or "public records." *See* Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 508 & n.165 (2006). Even in jurisdictions that resisted characterizing crime laboratory reports as business or public records, many legislatures enacted—and courts condoned—laws specifically making

such reports admissible in the prosecution's cases-in-chief in lieu of live testimony. *See id.* 478 & n.9.

This departure from traditional practice raised a serious constitutional question even during the *Roberts* era. *See, e.g.*, Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L.J. 671, 674-75 (1988). But the constitutionality of prosecutors' submitting forensic laboratory reports in lieu of live testimony has become especially suspect in the wake of this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* returned the Confrontation Clause to its traditional mode of operation—that is, to a procedural provision that forbids the government from introducing "testimonial" hearsay in place of live testimony at trial. A classic form of testimonial hearsay is an *ex parte* affidavit, *id.* at 43-49, and modern forensic laboratory certificates closely resemble such affidavits.

## STATEMENT

1. Massachusetts law requires a forensic analyst, upon a police officer's representation "that the analysis is to be used for the enforcement of law," to test evidence for the presence of illegal drugs or other chemicals. Mass. Gen. Laws ch. 111 § 12. The forensic analyst does not need to test all specimens that are part of a group from a common source; "[i]t is enough to make representative tests." *Commonwealth v. Shea*, 545 N.E.2d 1185, 1189 (Mass. App. 1989). Once testing is complete, Massachusetts law requires the forensic analyst, upon a police officer's request, to recount the results of his examination on a "signed certificate, on

oath" and to furnish the certificate to the officer. Mass. Gen. Laws ch. 111 § 13.

Massachusetts, like many other states, allows prosecutors to introduce such forensic analysts' certifications as substitutes for live testimony at trial. Specifically, a Massachusetts statute directs courts to admit sworn crime laboratory reports "as prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed or the net weight of any mixture containing the narcotic . . . or chemical analyzed." *Id.*, *see also* Mass. Gen. Laws ch. 22C § 39 (providing same when police department instead of department of health performs chemical analysis). "The purpose of [this statute] is to reduce court delays and the inconvenience of having the analyst called as a witness in each case." *Commonwealth v. Verde*, 827 N.E.2d 701, 704 n.1 (Mass. 2005). Accordingly, prosecutors need not call as witnesses the forensic analysts who prepare these reports, even if defendants request that they do so.

2. In November of 2001, the loss prevention manager of a Boston-area K-Mart called the police to report the suspicious activities of a store employee, Thomas Wright. According to the manager, Wright would sometimes leave the store, take short rides in a blue sedan, and return about ten minutes later.

The police came the store later that day. Shortly after arriving, they observed Ellis Montero drive up in a blue sedan, with petitioner Luis Melendez-Diaz riding in the front passenger seat. Wright got into the back seat of the sedan, and the three men drove

forward a short distance and stopped. The officers never noticed whether anything changed hands between the car's occupants, but, looking through the car's back window, the officers saw Wright lean forward and then back. When Wright got out of the car and began walking towards K-Mart, one officer stopped and searched him. The officer found four small bags in Wright's front pocket. Two of the bags contained white powder, and two contained light yellow powder with small clumps. Suspecting that a drug transaction had just taken place, officers arrested Wright, Montero, and Petitioner.

Officers then drove Wright, Montero, and Petitioner to the police station. While the three men were being booked, the officers inspected the police cruiser that had transported Montero and Petitioner. In the back seat, they found nineteen plastic bags containing dark yellow powder with large clumps.

The police officers submitted the plastic bags from Wright's pocket and from the back seat of the cruiser to the state crime laboratory for testing. Approximately two weeks later, two state-employed forensic analysts issued three sworn reports on letterhead from the Massachusetts Department of Public Health. The first two reports asserted that the four bags taken from Wright contained a total of 4.75 grams of a substance containing cocaine. The third report asserted that the nineteen bags found in the police cruiser contained 22.16 grams of a substance containing cocaine.

The reports, which are reproduced at App. 24a-29a, are largely conclusory. They do not describe the

qualifications or experience of the analysts who conducted the testing. They do not indicate whether any recordkeeping or storage measures had been taken to preserve the integrity of the items for testing. They do not identify the testing method the analysts used to arrive at their conclusions or describe any difficulties (and accompanying error rates) associated with the particular method(s) the analysts used to test for cocaine. Nor do the reports specify the percentages of cocaine allegedly present in the substances tested or otherwise address the differences in the samples that account for why some of the bags contain white powder and others contain dark yellow solids. The reports do, however, provide what the Commonwealth needed to prosecute a criminal case against Petitioner: declarations from state forensic analysts that the packages seized in connection with Petitioner's arrest weighed over fourteen grams and all contained cocaine.

3. The Commonwealth charged Petitioner with distributing cocaine and with trafficking in cocaine in an amount between fourteen and twenty-eight grams. *See* Mass. Gen. Laws ch. 94C §§ 32A & 32E(b)(1).

At trial, the prosecution offered the laboratory reports during a police officer's testimony as proof that the four bags recovered from Wright and the nineteen bags found in the police cruiser contained, respectively, 4.75 and 22.16 grams of substances containing cocaine. Petitioner objected and specifically cited *Crawford v. Washington*, 541 U.S. 36 (2004), to signal that introducing these reports without also calling to the stand the analysts who prepared them would violate his Sixth Amendment right to confrontation. Tr. at 2/81, 2/98. The trial court overruled the

objection without explanation and admitted the reports into evidence. *Id.* at 2/81. The Commonwealth never called the state forensic examiners to the stand or asserted that they were unavailable to testify.

After being instructed that the laboratory reports alone permitted it to conclude that the bags the officers seized contained cocaine, Tr. 3/69, the jury found Petitioner guilty on both counts. The court sentenced him to three years in prison, the mandatory minimum for trafficking in over 14 grams of substances containing cocaine, and to three years' probation.

4. The Appeals Court of Massachusetts affirmed. As is relevant here, the appellate court rejected Petitioner's *Crawford* argument on the basis of the Massachusetts Supreme Judicial Court's prior holding in *Commonwealth v. Verde*, 827 N.E.2d 279 (Mass. 2005), that introducing "certificates of drug analysis" in lieu of live testimony does not "deny a defendant the right of confrontation." App. 8a n.3. (The *Verde* decision is reproduced at App. 12a-23a.)

5. Petitioner sought discretionary review of this decision in the Massachusetts Supreme Judicial Court. He argued, among other things, that "*Verde* is contrary to the holding in *Crawford* and the United States Supreme Court's post-*Verde* decision in *Davis v. Washington* because the primary purpose of the analyses was to produce evidence for use in a criminal prosecution." Petr. Br. for Further Appellate Review in Mass. S.J.C. at 15-16. The Massachusetts Supreme Judicial Court denied review without comment.

## REASONS FOR GRANTING THE WRIT

This Court held in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Confrontation Clause prohibits the prosecution from introducing "testimonial" hearsay against a criminal defendant unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. Federal courts of appeals and state courts of last resort are now divided six-to-five over whether state forensic laboratory reports prepared for use in criminal prosecutions are testimonial.

This Court should use this case to resolve this conflict. Forensic reports are an integral part of a large number of criminal prosecutions. Exempting them from the rigors of the adversarial process poses a significant threat of wrongful convictions. And the holding below—namely, that a state forensic analyst's sworn report analyzing evidence the police seized at a crime scene is not testimonial—is incorrect. *Crawford* and this Court's subsequent decision in *Davis v. Washington*, 126 S. Ct. 2266 (2006), dictate that such formalized statements made for prosecutorial purposes are quintessentially testimonial.

### I. The Decision Below Implicates an Irreconcilable Conflict Among Federal and State Courts.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that the prosecution may not introduce "testimonial" hearsay against a criminal defendant unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. *Id.* at 54, 68. This Court "le[ft] for another day any effort

to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. Nonetheless, this Court did provide some guidance concerning the concept. It emphasized that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure"—particularly "its use of *ex parte* examinations" and "sworn *ex parte* affidavits" as evidence against the accused. *Id.* at 50, 52 n.3. Accordingly, "formal statement[s] to government officers" and other statements produced with the "[i]nvolvement of government officers . . . with an eye toward trial" are paradigmatically testimonial statements. *Id.* at 51, 56 n.7. At the same time, this Court noted that certain hearsay evidence that was admissible at the time of the Founding was nontestimonial. Such hearsay included "business records [and] statements in furtherance of a conspiracy." *Id.* at 56.

Since *Crawford*, state supreme courts and the federal courts of appeals have become deeply divided over whether forensic examiners' drug analysis certificates and similar laboratory reports—which are formalized, evidentiary documents prepared with an eye toward trial, but which also are sometimes classified under modern hearsay law as business records—are testimonial.

1. In this case, the Appeals Court of Massachusetts applied the binding decision of the Massachusetts Supreme Judicial Court in *Common-wealth v. Verde*, 827 N.E.2d 701 (2005), to hold that forensic reports certifying under oath that a substance the police seized is an illegal drug are not testimonial. The *Verde* court offered two reasons for this conclusion. First, citing *Crawford*'s mention of the admissibility of

business records at the time of the Founding, the Massachusetts Supreme Judicial Court asserted that a drug analysis certificate "is akin to a business record and the confrontation clause is not implicated by this type of evidence." *Id.* at 702, App. 12a. Second, the Massachusetts Supreme Judicial Court reasoned that drug analysis reports "are neither discretionary nor based on opinion," but rather are a product of a "well-recognized scientific test." *Id.* at 705, App. 17a.

Four other state supreme courts and one federal appeals court likewise have held that forensic laboratory reports prepared in contemplation of prosecution are not testimonial. *See United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006) (police-directed blood test indicating the presence of methamphetamine); *State v. O'Maley*, 932 A.2d 1 (N.H. 2007) (blood alcohol analysis); *People v. Geier*, 161 P.3d 104 (Cal. 2007) (DNA analysis);[1] *State v. Forte*, 629 S.E.2d 137 (N.C. 2006) (DNA analysis); *State v. Dedman*, 102 P.3d 628 (N.M. 2004) (blood alcohol analysis). Intermediate courts in two other states also have also held that such laboratory reports are nontestimonial. *See Pruitt v. State*, 954 So.2d 611 (Ala. Crim. App. 2006) (certificate of drug analysis); *People v. Meekins*, 828 N.Y.S.2d 83 (N.Y. App. Div. 2006) (DNA analysis).

In addition to the business record and reliability rationales in *Verde,* the California and New Hampshire Supreme Courts have advanced one other reason for holding that the Confrontation Clause does not

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[1] *See also People v. Salinas*, 146 Cal. App. 4th 958 (Cal. App. Ct.) (finding laboratory reports identifying the presence of methamphetamine to be nontestimonial), *rev. dismissed*, 167 P.3d 25 (Cal. 2007) (review dismissed "in light of [*Geier*]").

apply in this setting. Drawing on this Court's post-*Crawford* decision in *Davis v. Washington*, 126 S. Ct. 2266 (2006), which held that statements describing an ongoing emergency to a 911 operator are not testimonial, these courts have reasoned that forensic laboratory reports are nontestimonial because they "constitute [the analyst's] contemporaneous recordation of observable events." *Geier*, 161 P.3d at 139; *see also O'Maley*, 932 A.2d 1, at 11-12 (following *Geier*).

2. In direct contrast, five state supreme courts have held that forensic laboratory reports prepared in contemplation of prosecution are testimonial. *See Hinojos-Mendoza v. People*, ___ P.3d ___, 2007 WL 2581700 (Colo. Sept. 10, 2007) (laboratory report identifying presence of illegal drug); *State v. March*, 216 S.W.3d 663 (Mo.) (same), *cert. dismissed*, 128 S. Ct. ___ (Oct. 5, 2007);[2] *Thomas v. United States*, 914 A.2d 1 (D.C. 2006) (same); *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006) (same); *City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005) (affidavit from nurse who drew blood to conduct blood alcohol analysis).[3] Intermediate courts in six other states also have held that such laboratory reports are testimonial. *See State*

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[2] The State of Missouri filed a petition for certiorari in *March*, raising the same question presented here. But the State later moved to dismiss the petition as moot because it had entered into a plea bargain with the defendant.

[3] One other state supreme court has stated that a forensic laboratory report "bears testimony in the sense that it is a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact'" but did not ultimately render a holding on whether such a report is testimonial. *State v. Campbell*, 719 N.W.2d 374, 376 (N.D. 2006) (quoting *Crawford*, 541 U.S. at 51), *cert. denied*, 127 S. Ct. 1150 (2007).

*v. Laturner*, 163 P.3d 367 (Kan. Ct. App. 2007) (report certifying presence of illegal drug); *State v. Moss*, 160 P.3d 1143 (Ariz. Ct. App. 2007) (report alleging presence of illegal drugs in blood sample); *State v. Smith*, 2006 WL 846342 (Ohio Ct. App. 2006) (report certifying that substance contained illegal drug); *Johnson v. State*, 929 So.2d 4 (Fla. Dist. Ct. App. 2005) (certificate of chemical analysis), *rev. granted*, 924 So.2d 810 (Fla. 2006); *State v. Miller*, 144 P.3d 1052 (Or. Ct. App. 2006) (same), *opinion adhered to on reconsideration*, 149 P.3d 1251 (Or. Ct. App. 2006); *Deener v. State*, 214 S.W.3d 522 (Tex. App. 2006) (same), *rev, denied* (Tex. Crim. 2007).

The courts holding that forensic reports are testimonial have provided a more uniform rationale than courts on the other side of the conflict. These courts reason that such reports are created solely for use in criminal prosecutions and present *ex parte* attestations aimed at helping to prove the defendant's guilt. The Missouri Supreme Court, for example, explained:

> Under the definitions of "testimony" and "testimonial" in *Crawford*, as well as the "primary purpose" test in *Davis*, it is clear that the laboratory report in this case constituted a "core" testimonial statement subject to the requirements of the Confrontation Clause. The laboratory report was prepared at the request of law enforcement for [the defendant's] prosecution. It was offered to prove an element of the charged crime—*i.e.*, that the substance [the defendant] possessed was cocaine base. The

> report was a sworn and formal statement offered in lieu of testimony by the declarant. Use of sworn *ex parte* affidavits to secure criminal convictions was the principal evil at which the Confrontation Clause was directed. *Crawford*, 541 U.S. at 50. A laboratory report, like this one, that was prepared solely for prosecution to prove an element of the crime charged is "testimonial" because it bears all the characteristics of an *ex parte* affidavit.

*March*, 216 S.W.3d at 666; *see also Hinojos-Mendoza*, 2007 WL 2581700, at *5 (report testimonial because it is a document "prepared at the direction of the police . . . in anticipation of criminal prosecution"); *Caulfield*, 722 N.W.2d at 309 ("The report conforms to the types of statements about which the Court in *Crawford* expressed concern—affidavits and similar documents admitted in lieu of present testimony at trial."); *Thomas*, 914 A.2d at 13 ("The use of such *ex parte* affidavits to secure criminal convictions was 'the principal evil at which the Confrontation Clause was directed.' We agree with *amicus* that 'it is difficult to imagine a statement more clearly testimonial.'" (citation omitted)); *Walsh*, 124 P.3d at 207.

This conflict over the nature of forensic examiners' crime laboratory reports is deeply entrenched. Nothing could be gained from further percolation. Courts have had ample time to digest *Crawford*, and they have continued to reach conflicting decisions after *Davis*. Indeed, recent opinions simply acknowledge the division of authority over this issue and choose a side. *See, e.g.*, *March*, 216 S.W.3d at 667 n.2; *Hinojos-*

*Mendoza*, 2007 WL 2581700, at *4; *Geier*, 161 P.3d at 134-38; *O'Maley*, 932 A.2d 1, at 10-13. It is time for this Court to step in.

## II. The Question Presented Significantly Impacts the Administration of Criminal Justice.

For at least three reasons, this Court should not allow the conflict over whether forensic laboratory reports are testimonial to persist.

1. Crime laboratory analyses play a central evidentiary role in a large number of criminal trials. Prosecutions that lack direct evidence identifying the perpetrator depend heavily on scientific evaluations of circumstantial evidence. Forensic analyses, of course, also are at the center of many drug prosecutions, such as the one here. And given the onward march of technology, criminal prosecutions in the future promise to rely even more on scientific analysis. The new practice of prosecutorial DNA testing is only a glimpse of what is likely to come.

2. The question presented implicates practices across the country. Forty-four states and the District of Columbia have hearsay exceptions permitting courts to admit forensic examiners' certified reports to establish the identity of controlled substances. *See* Metzger, 59 Vand. L. Rev. at 478 & n.9. Numerous states also allow the admission of forensic certificates as hearsay evidence to proffer "the results of DNA tests, microscopic hair analyses, fingerprint identifications, coroners' reports, ballistics tests, and a wide range of other tests conducted by a crime laboratory." *Id.* at 479; *see id.* at 479 n.12 (collecting citations).

3. The unchecked use of state crime laboratory reports in place of live testimony undermines the integrity of the criminal justice system. Recent reports have shown that "tainted or fraudulent science" contributes to a large proportion—perhaps as much as one-third—of wrongful convictions. *See* Barry Scheck et al., Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted 246 (2000); *see also* Metzger, 59 Vand. L. Rev. at 491-500 (detailing numerous examples). The leading treatise on scientific evidence further observes:

> This is an especially appropriate time to put drug testing under the microscope. There have been recent indications that drug identification testimony is sometimes erroneous or worse. Despite the extensive experience of drug tests, there seems to be a significant error rate in drug testing conducted by some American laboratories . . . .

2 Paul C. Giannelli & Edward J. Imwinkelried, Scientific Evidence §23.01 (4th ed. 2007).

These error rates derive from several factors. First, many prosecutorial crime laboratories use protocols that generate undependable results. One study revealed that 30% of state forensic examiners asked to test a substance for the presence of cocaine rendered incorrect results. *See* U.S. Dep't of Justice, *Project Advisory Committee, Laboratory Proficiency Testing Program, Supplementary Report—Samples 6-10*, at 3 (1976). Even the FBI's most sophisticated laboratories have been plagued by startling error rates. *See* Paul C. Giannelli, Ake v. Oklahoma: *The*

*Right to Expert Assistance in a Post*-Daubert, *Post-DNA World*, 89 Cornell L. Rev. 1305, 1320 (2004) (describing a 1997 report by the Department of Justice Inspector General). Second, a substantial number of crime laboratories are not even required to follow any standardized procedures. "[O]f the 400-500 laboratories conducting forensic examinations for criminal trials, only 283 are accredited." Metzger, 59 Vand. L. Rev. at 494. Finally, many forensic examiners, as employees of state police and other law enforcement departments, are prone to prosecutorial bias. *See., e.g.*, Edward J. Ungvarsky, *Remarks on the Use and Misuse of Forensic Science to Lead to False Convictions*, 41 New Eng. L. Rev. 609, 618 (2007). This bias can subconsciously influence examiners' conclusions or cause them outright to manipulate evidence. Recent scandals in Baltimore, Phoenix, and Houston have revealed rampant falsification of evidence in those cities' crime laboratories. *See* Metzger, 59 Vand. L. Rev. at 495 & n.83.[4]

These realities demand that state forensic examiners' evidentiary certifications be subject to the customary processes of direct and cross-examination. If state forensic examiners understand that they may have to present and defend their work in front of judges and juries at public trials, they are more likely to be careful and conscientious, and to use the best

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[4] Massachusetts' forensic laboratories also have faced recent criticism for mishandling evidence and issuing erroneous reports. *See* Jonathan Saltzman & John R. Ellement, *Crime Lab Mishandled DNA Results*, Boston Globe, Jan. 13, 2007, at A1; Jack Thomas, *Two Police Officers Are Put on Leave: Faulty Fingerprint Evidence Is Probed*, Boston Globe, April 24, 2004, at B1.

available testing methods. And when examiners do make mistakes or commit malfeasance, our judicial system's traditional adversarial process is more likely than a system of trial-by-affidavit to uncover the truth. There is no doubt our Framers understood this, and the time has come to reaffirm this time-tested principle.

## III. This Case Is an Excellent Vehicle for Considering the Question Presented.

This case presents an excellent vehicle for resolving the split of authority over the question presented.

1. This case raises the question presented free from any waiver or collateral review complications. The case comes to this Court on direct review, and Petitioner unambiguously objected at trial that introducing the forensic laboratory reports without the live testimony of the analysts would violate his federal constitutional right to confrontation. Tr. at 2/81, 2/98. Petitioner also preserved this issue by contending at each level of the Massachusetts appellate courts that the admission of the reports violated the Sixth Amendment. *See* Petr. Mass. C.A. Br. at 37; Petr. Br. for Further Appellate Review in Mass. S.J.C. at 15-16. Finally, the Massachusetts courts resolved the issue on the merits. App. 8a n.3.

2. The Sixth Amendment issue here turns exclusively on whether the forensic laboratory certification is testimonial. Unlike some other states, Massachusetts does not have any statutory procedure that allows defendants to demand before trial that the prosecution call a forensic examiner to the stand or even that advises that defendants must subpoena such

examiners if they wish them to appear at trial. *Compare Verde,* 827 N.E.2d at 706, App. 19a (resolving Sixth Amendment challenge solely on testimonial issue), *with Caulfield*, 722 N.W.2d at 310, 313, 317-18 (holding unanimously that forensic laboratory reports are testimonial but dividing over whether Minnesota's statutory "notice and demand" procedure otherwise satisfied Sixth Amendment); *State v. Campbell*, 719 N.W.2d 374, 377 (N.D. 2006) (avoiding testimonial question on the ground that North Dakota's statutory "notice and demand" procedure satisfied the Sixth Amendment), *cert. denied,* 127 S. Ct. 1150 (2007). Accordingly, there can be no claim that some procedural aspect of state law satisfied Petitioner's right to confrontation.

3. This case aptly illustrates the dangers of allowing the government to introduce lab reports in place of live testimony subject to cross-examination. When the police arrested Petitioner, they seized twenty-three bags that they suspected contained cocaine. The four bags that the police seized from Wright contained white and light yellow powder. The nineteen bags, by contrast, that the officers later recovered from the patrol car contained a dark yellow, chunky substance. The question whether those nineteen bags contained cocaine is critical, for the certified weight of the substance in those bags transformed the charges against Petitioner from drug distribution, which carries no mandatory jail time, into a drug trafficking offense, which carries a three-year mandatory minimum prison sentence. Yet the Commonwealth did not present any evidence besides the forensic analyst's certification to support its allegation that the substance in the nineteen bags contained cocaine.

What is more, nothing even in forensic reports explains whether the chunky substance in the nineteen bags could have come from the same source as the powder in the four bags seized from Wright. If the substances in the different bags had different origins and chemical compositions, it is takes more of a leap to infer, as the prosecution asked the jury to do, that Petitioner sold Wright the substance in the four bags. Had an analyst taken the stand at trial, Petitioner's counsel could have observed his testimony, demeanor, and attentiveness to detail, and decided whether to press the analyst with respect to his testing procedures and proffered findings.

## IV. The Decision Below Misconstrues the Confrontation Clause.

This Court's precedents dictate that a laboratory report, prepared by a state forensic examiner to further a criminal investigation, is testimonial evidence.

1. In *Crawford*, this Court observed that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U.S. at 50; *see also Mattox v. United States*, 156 U.S. 237, 242 (1895) (clause intended to prohibit "*ex parte* affidavits" in place of live testimony). The Framers directed the Clause at this method of creating and presenting evidence because the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly

familiar." *Crawford*, 541 U.S. at 56 n.7. In *Davis v. Washington*, this Court further explained that statements made to police officers "are testimonial when the circumstances objectively indicate . . . that the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution." 126 S. Ct. at 2273-74.

State forensic examiners' crime laboratory reports fall squarely within this class. Forensic examiners in Massachusetts, as elsewhere, create such laboratory reports at the behest of police officers "for the enforcement of law." Mass Gen. Laws ch. 111 § 12; *see also Hinojos-Mendoza*, 2007 WL 2581700, at *14 (drug certificates are created "in anticipation of criminal prosecution"). The reports are formal, sworn statements. Mass. Gen. Laws ch. 111 § 13; *see* App. 24a-29a. And they are forthrightly offered "in lieu of present testimony at trial." *Caulfield*, 722 N.W.2d at 309; *see also Verde*, 827 N.E.2d at 704 n.1, App. 14a n.1 (certificates are offered to avoid "having the analyst called as a witness in each case"). They thus are exactly the kind of "solemn declaration[s] or affirmation[s]" that *Crawford* and *Davis* characterized as quintessentially testimonial. *Crawford*, 541 U.S. at 51; *Davis*, 126 S. Ct. at 2274.

Further, although this Court has never squarely decided the issue, it has assumed on several occasions that the prosecution may not introduce a crime laboratory report as a substitute for presenting live testimony from a forensic examiner. As early as 1912, this Court stated that certain pretrial "testimony," including an autopsy report, "could not have been admitted without the consent of the accused . . . be-

cause the accused was entitled to meet the witnesses face to face." *Diaz v. United States*, 223 U.S. 442, 450 (1912).[5] Years later, this Court noted that when the government performs "scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like[,] . . . the accused has the opportunity for a meaningful confrontation of the Government's case at trial." *United States v. Wade*, 388 U.S. 218, 227-28 (1967). Similarly, in refusing to recognize a due process right to have the government preserve breath samples, this Court observed that "the defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the factfinder whether the test was properly administered." *California v. Trombetta*, 467 U.S. 479, 490 (1984).

2. None of the three rationales that the Massachusetts Supreme Judicial Court and other courts have invoked to characterize forensic examiners' laboratory reports as nontestimonial provide any reason to retreat from this straightforward application of the Confrontation Clause.

a. The Massachusetts Supreme Judicial Court held that forensic reports identifying controlled substances are not testimonial in part based on the supposed reliability of such scientific tests, reasoning that they are "neither discretionary nor based on opinion." *Verde*, 827 N.E.2d at 705, App. 16a; *see also Dedman*, 102 P.3d at 636 (finding forensic reports nontest-

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[5] This Court in *Diaz* was discussing the Philippine Constitution's counterpart to the Confrontation Clause, but the Court proceeded on the basis that the two provisions confer the same protection. 223 U.S. at 450-51.

imonial because "the process [of their creation] is routine, non-adversarial, and made to ensure an accurate measurement"); *Forte*, 629 S.E.2d at 143 (same). This is nothing more than *Roberts redux*. Even if these courts' assessment of the reliability of forensic testing were correct, *but see supra* at 16-17, this Court expressly rejected such legal reasoning in *Crawford*: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." 541 U.S. at 62. Defendants have a right to insist that prosecutorial testimony be presented through the adversarial process, regardless of whether judges surmise that cross-examination would likely bear fruit.

b. Nor does *Crawford*'s reference to business records support deeming forensic reports nontestimonial. The common law "shop book rule" exception for regularly kept business records, to which *Crawford* adverted, *see* 541 U.S. at 56, did not remotely encompass reports generated for prosecutorial use. *See Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943) (explaining that records "calculated for use essentially in the court" or whose "primary utility is in litigating" fall outside of common law rule, and declining to expand federal exception to allow their admission); *State v. Miller*, 144 P.3d 1052, 1058-60 (Or. Ct. App. 2006) (tracing history of business records exception and concluding that state crime laboratory reports fall outside historical exception). Even as recently as the 1970s, the drafters of the Federal Rules of Evidence declined to expand the "public records" exception in criminal cases to include "matters observed by police officers and other law enforcement personnel" and

"factual findings resulting from an investigation." Fed. R. Evid. 803(8). They took this action "in view of the almost certain collision with confrontation rights which would result from [such records'] use against the accused in a criminal case." Advisory Committee's Notes, Note to Paragraph (8) of Rule 803, 56 F.R.D. 313 (1972). *See generally United States v. Oates*, 560 F.2d 45, 68-73 (2nd Cir. 1977).

It makes no difference that some jurisdictions, such as Massachusetts, have since decided to characterize laboratory reports as "akin to" business records, 827 N.E.2d at 702, App. 12a, or that others have gone so far as to expand their statutory definitions of business records expressly to include state crime laboratory reports. As this Court emphasized in *Crawford*, the reasons for subjecting testimonial statements to confrontation procedures "do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." 541 U.S. at 56 n.7. In other words, "*ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them." *Id.* at 51. Accordingly, jurisdictions may no more insulate state crime laboratory reports from confrontation scrutiny by labeling them business records as they could by giving the same label to transcripts of custodial interrogations, which, after all, police conduct in their ordinary course of business.

c. Finally, this Court's decision in *Davis* does not support courts' attempts to classify laboratory reports as nontestimonial on the ground that they are "contemporaneous recordation[s] of observable events."

*Geier*, 161 P.3d at 139. *Davis* involved a drastically different scenario than is at issue here—namely, a crime victim calling 911 in the midst of an ongoing emergency. To the extent that timing matters in that context, *Davis* holds that a declarant's statements are nontestimonial when they narrate threatening, criminal events while they are actually happening. Nothing in that decision suggests that a state official's formalized description of evidence that police seized days or weeks before is not testimonial, especially when the forensic report's express purpose is to build a case for prosecution.

The crux of *Davis*, like *Crawford* before it, is that statements gathered for "the primary, if not indeed the sole, purpose of . . . investigat[ing]" a past crime are testimonial. *Davis*, 126 S. Ct. at 2278; *see also id.* at 2273-74; *Crawford*, 541 U.S. at 53 (statements obtained by police officers serving an "investigative and prosecutorial function" are testimonial). That is the undeniable purpose of sworn forensic reports. This Court should not wait any longer to make clear that the Confrontation Clause applies to such evidence.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 26, 2007

# APPENDIX

**APPENDIX A**

**COMMONWEALTH OF MASSACHUSETTS**
**APPEALS COURT**

**05-P-1213.**

**COMMONWEALTH,**
**vs.**
**LUIS E. MELENDEZ-DIAZ**

July 31, 2007.

***MEMORANDUM AND ORDER PURSUANT TO RULE 1:28***

On appeal from judgments on guilty verdicts returned by a jury on indictments charging him with distributing and trafficking in cocaine, see G.L.C. 94C, §§ 32 and 32E, the defendant argues that: (1) he was entitled to required findings of not guilty; (2) the admission in evidence of the drug analysis certificates was inconsistent with *Crawford v. Washington*, 541 U.S. 36 (2004), and violated *Commonwealth v. Lanigan*, 419 Mass. 15 (1994); and (3) his trial counsel was ineffective in failing to file a motion to suppress evidence and to point out to the jury the packaging of the seized cocaine. We affirm the judgments.

1. *The evidence.* At trial, evidence was presented establishing that on five or six occasions over a three month period in the fall of 2001, the loss prevention manager (manager) of a K-Mart store (store) located in Dorchester observed Thomas Wright, the store's human resource manager, make and receive external telephone calls, that is, telephone calls neither placed

to nor received from persons within the store. Immediately after receiving each of these calls, Wright would walk outside and stand by the front entrance to the store. He would then get into a blue, four-door Mercury Sable sedan driven by a Hispanic male and sometimes carrying a passenger. The car would drive away and return about ten minutes later, with Wright exiting the car and going back into the store.

At about 2:30 P.M., on November 15, 2001, the manager reported his observations of Wright's activities to Boston police Detective Robert Pieroway, who immediately went to the store and set up surveillance of the front outside area of the store. It was about 3:00 P.M. when Pieroway saw Wright come out of the store, stand on the sidewalk looking around the parking lot, and after a few minutes, go back into the store. Pieroway next saw a blue Mercury Sable sedan drive past the store, make a U-turn, and drive back to the front of the store, and stop. The driver, codefendant Ellis Montero, was talking on a cell phone and the defendant was in the front passenger seat. Just as Montero arrived at the front of the store, Wright came out and got into the back seat of the car. The manager also saw this activity, which was consistent with what he had seen on prior occasions and had reported to the police.

Once Wright was in the car, Montero drove slowly through the parking lot. A few seconds later, the car was within ten feet of Pieroway, who could see Wright leaning forward between the two individuals in the front seats. When Wright leaned back, Montero stopped, Wright got out of the car and walked back toward the store. Outside the store, Pieroway stopped Wright,

who told Pieroway that he had four bags of cocaine on his person. Pieroway then searched Wright and retried from his front pant pocket a plastic bag in which there were four clear white plastic bags containing a total quantity of 4.75 grams of cocaine having a value of about $320 to $400.[1]

Pieroway immediately advised Boston police Officers Ryan and Anderson, stationed in a cruiser in the parking lot, to arrest the two men in the blue car that was driving away.

Ryan and Anderson stopped the car, arrested Montero and his passenger, the defendant, and frisked them for weapons. In compliance with police procedure, the officers did not search either of the men or the car for contraband as they were only assisting with the stop. A search of the car for contraband would be conducted by drug unit officers. Ryan and Anderson placed the defendant and Montero in the backseat of their cruiser, positioning the defendant directly behind the front passenger seat and Montero behind the driver. The officers then drove to the front of the store where Wright was also placed in the back of the cruiser.

The three men were seated with their hands cuffed behind their backs. Montero was directly behind the driver, the defendant in the middle, and Wright behind the front passenger. During the less than eight minute trip to the police station, the defendant and Montero were "speaking in Spanish," "fidgeting," "making furtive movements in the back," and leaning

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[1] The four bags of cocaine taken from Wright were entered in evidence.

various ways to create space between them, while Wright made no unusual movements and did "nothing." Through the rear-view mirror, Ryan saw Montero and the defendant "jumping around" and felt them kicking the back of the front seats. At one point during the trip, Ryan told them to "knock it off, quit moving around."

During the booking process at the police station, the police recovered two cellular phones and $301 from Montero and a pager and $157 from the defendant. Meanwhile, Anderson returned to the cruiser in which the three men had been transported. He was motivated to do so because of the actions and movements of the defendant and Montero during the trip to the station. Anderson found a fold of money totaling $320 on the ground next to the door used by Montero and the defendant in getting out of the cruiser. Looking in the back area of the cruiser, Anderson found a plastic bag containing nineteen plastic bags of cocaine on the floor in a recess in the partition between the front and back seats on the driver's side of the cruiser.[2]

No one was in the parking lot when Ryan and Anderson arrived at the police station with the three men. Nor was anyone in the lot when Anderson returned to the cruiser and found the money and drugs. Soon after his discovery of the money and the bag containing nineteen other bags, Anderson was joined in the parking lot by Pieroway, who took possession of the nineteen bags which were thereafter analyzed and found to contain a total of 22.16 grams of cocaine.

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[2] The nineteen bags found by Anderson in the backseat area of the cruiser were entered in evidence.

According to Pieroway, the nineteen bags retrieved from the cruiser "appeared to be the same size and same packaging, same look[ ], everything as the four that [he] recovered from . . . Wright." Pieroway also testified that the $320 found by Anderson was the same amount that Wright had paid for his purchase of the four bags of cocaine retrieved from him.

There was also evidence establishing that prior to leaving the police station on the morning of November 15, 2001, Ryan had inspected the cruiser to make certain that there was no contraband on the front or back seats, and that the cruiser was in the possession of only Ryan and Anderson for the entire day. In addition, on that day no one had been in the backseat of the cruiser other than Montero, the defendant, and Wright.

2. *The sufficiency of the evidence.* In contending that he was entitled to a required finding of not guilty on each of the indictments against him, the defendant argues that the evidence was insufficient to show that a drug transaction had taken place on the afternoon of November 15, 2001, or that he was a joint venturer in such a transaction.

We begin our analysis of the defendant's argument with *Commonwealth v. Hernandez*, 439 Mass. 688, 694 (2003), in which the Supreme Judicial Court stated:

> "[T]o prove the defendant guilty as a joint venturer, the Commonwealth was required to prove that he was present at the scene of the crime, had knowledge that another

> intended to commit the crime and shared the intent to commit the crime, and by agreement was willing and available to help the other if necessary. *Commonwealth v. Netto*, 438 Mass. 686, 700[-701] (2003). . . . [Additionally], to prove the defendant guilty of trafficking on a joint venture theory, the Commonwealth must prove (1) that the underlying crime of trafficking in cocaine was committed and (2) that the elements of joint venture defined above were satisfied. See *Rendon-Alvarez v. Commonwealth*, 437 Mass. 40, 44-45 (2002)."

In considering whether the Commonwealth met its burden of proof, we take the evidence and the reasonable inferences that can be drawn therefrom in the light most favorable to the Commonwealth. See *Commonwealth v. Gunter*, 427 Mass. 259, 264-265 (1998), and cases therein cited.

There can be no real question concerning the sufficiency of the Commonwealth's evidence, i.e., the testimony of the manager, Pieroway, Ryan, and Anderson, the surveillance photos taken at the time of the crime, and the similarity of the packaging of the drugs retrieved from Wright and those taken by Anderson from the back of the cruiser, to put to the jury the question of whether the defendant was a willing participant in the distribution of cocaine to Wright. The evidence allows for the reasonable inference that the defendant knew Montero intended to sell drugs to Wright, who had purchased drugs on prior occasions while in the car. The defendant's reliance upon *Commonwealth v. Deagle*, 10 Mass. App.

Ct. 563 (1980), *Commonwealth v. Saez*, 21 Mass. App. Ct. 408 (1986), and *Commonwealth v. McKay*, 50 Mass. App. Ct. 604 (2000), is misplaced as those cases are factually inapposite.

Based upon the evidence presented in the instant matter, a juror could reasonably infer that neither Montero nor Wright, especially Wright, would engage in a criminal transaction in the presence of one "unconnected to the business being conducted." *Commonwealth v. Fernandez*, 57 Mass. App. Ct. 562, 567 (2003). The defendant also possessed a pager, a "traditional accouterment of the illegal drug trade." *Commonwealth v. Gollman*, 436 Mass. 111, 116 (2002). In addition, as earlier related, there was evidence to show that during the ride to the station, Montero and the defendant were seated next to each other conversing in Spanish while "fidgeting," "jumping around," leaning towards opposite windows, and "kicking under the seat." Although, and as the defendant argued before us, such activity could be thought to have been caused by discomfort attributable to their hands being cuffed behind their backs, we think a sinister inference was also reasonably available, that is, the actions of the men were attributable to their attempts to remove contraband and money from their persons. Such an inference is almost inescapable in view of the testimony of Ryan, Anderson, and Pieroway that the money found on the ground next to the door used by Montero in getting out of the cruiser matched the amount paid by Wright for the cocaine found on him, and that the drugs found in the cruiser were packaged in a manner resembling those found on Wright at the time of his arrest.

Based on all the evidence, including the drug analysis certificates concerning the substances taken from Wright and the back of the cruiser, see *Commonwealth v. Verde*, 444 [Mass.] 279, 282-283 (2005),[3] we conclude that the judge did not err in denying the defendant's motion for required findings of not guilty on the indictments charging him with distributing and trafficking in cocaine.

3. *Trial counsel's representation of the defendant.* In claiming that he did not have the effective assistance of counsel at trial, the defendant points to his trial attorney's failure to file a motion to suppress the retrieved drugs and to point out to the jury that the police officers testified "falsely" about the similarities between the packages taken from Wright and from the cruiser.[4]

a. Failure to file a motion to suppress. "It is not ineffective assistance of counsel when trial counsel declines to file a motion with a minimal chance of success." *Commonwealth v. Conceicao*, 388 Mass. 255, 264 (1983), citing *Commonwealth v. Saferian*, 366 Mass. 89, 99 (1974). Even assuming that the

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[3] In *Commonwealth v. Verde, supra,* this court held that certificates of drug analysis did not deny a defendant the right of confrontation and were, therefore, not subject to the holding in *Crawford v. Washington,* 541 U.S. 36 (2004). We see no merit to the defendant's simple assertions that *Verde* is contrary to *Crawford* and that the certificates of drug analysis were accepted in evidence without first satisfying the requirements of *Commonwealth v. Lanigan,* 419 Mass. at 25-26.

[4] The defendant did not file a motion for a new trial, and instead raises the claim of ineffective assistance of counsel for the first time on appeal. See *Commonwealth v. Henley,* 63 Mass. App. Ct. 1, 7-8 (2005).

defendant could challenge the stop and arrest of Wright, but see *Commonwealth v. King*, 389 Mass. 233, 240-241 (1983), such an assumption would gain the defendant nothing.

All the previously recited facts leading up to Wright's arrest establish that the police had probable cause to arrest and search him. As for the drugs and money found in the cruiser and on the ground near the cruiser in the police parking lot, we need say no more than that the defendant could have had no reasonable expectation of privacy with respect to those items. See *Commonwealth v. Paszko*, 391 Mass. 164, 184 (1984); *Commonwealth v. Pina*, 406 Mass. 540, 544-545 (1990).

It is these circumstances upon which we rely in concluding that any motion to suppress the evidence seized by the police had little, if any, chance of success. Therefore, trial counsel's failure to pursue such a motion does not constitute ineffective assistance of counsel.

b. *Failure to stress certain testimony*. We put the best spin possible on the defendant's contention on his claim that if the bags of cocaine taken from Wright and from the back of the cruiser were found to be dissimilar, the defendant could not be found guilty on either of the indictments against him. From that premise flows the defendant's argument that his trial counsel was ineffective by reason of his failure to "point . . . out" the dissimilarities between the recovered packages of cocaine and thereby also show that the police officers' testimony to the contrary was false.

Based on the evidence presented at trial on the clearly framed theories of guilt and the lack thereof, as well as the jury instructions, the jury was well aware of the need to determine whether the packages taken from Wright were similar to those found in the cruiser. In resolving this disputed question of fact, similar or dissimilar, the jury had available to them all the seized packages of cocaine. See notes 1 & 2, *supra*.[5]

It follows from all that we have said that trial counsel's alleged failure to stress any alleged and important dissimilarities in the packages put before the jury does not constitute ineffective assistance of counsel.

*Judgments affirmed.*

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[5] Prior to oral argument, counsel for the Commonwealth and the defendant filed a joint motion requesting that we exercise our power to order the transmission of the packages of cocaine in evidence to this court. See Mass.R.A.P. 9(b), as appearing in 378 Mass. 935 (1979). Counsel for the defendant filed a renewed motion less than one week before oral argument, which was denied. At oral argument, counsel for the defendant orally reviewed the motion. Because we conclude that the question of similarity was one of fact to be resolved by the jury, we have no occasion to depart from our well established practice to refrain from seeking the transmission of drugs or weapons to this court. Consequently, the motion renewed during oral argument is denied.

## APPENDIX B

## COMMONWEALTH OF MASSACHUSETTS
## SUPREME JUDICIAL COURT

**COMMONWEALTH,**
**vs.**
**LUIS E. MELENDEZ-DIAZ**

September 26, 2007

*Further appellate review denied.*

## APPENDIX C

## COMMONWEALTH OF MASSACHUSETTS SUPREME JUDICIAL COURT

**SJC-09320**

**COMMONWEALTH,**
**vs.**
**ALBERTO VERDE**

May 19, 2005

IRELAND, J.

This appeal raises the question whether, in light of *Crawford v. Washington*, 541 U.S. 36 (2004) (*Crawford*), the confrontation clause of the Sixth Amendment to the United States Constitution requires that laboratory technicians who analyze drugs seized as part of a criminal investigation authenticate their laboratory findings by appearing at a defendant's trial. Because we conclude that a drug certificate is akin to a business record and the confrontation clause is not implicated by this type of evidence, we answer in the negative and affirm the conviction.

After a Superior Court jury convicted the defendant of trafficking in cocaine (in an amount over one hundred but less than 200 grams), the trial judge sentenced the defendant to from ten to twelve years. The defendant appealed, claiming a number of errors, and we transferred this case from the Appeals Court on our own motion.

*Facts and procedural background.*

We recount the relevant facts, reserving certain details for our discussion. On July 25, 1997, the Worcester police executed a search warrant at the defendant's residence. After receiving the Miranda warnings, the defendant told police he had one-half ounce of cocaine in his pocket, which the police confiscated. In a bureau in the defendant's bedroom, the police found items commonly used in the drug trade, including a "cutting agent," a brown paper bag with "chunks" of "crack" cocaine and "regular" cocaine, a scale, packaging material, and plastic baggies. The police also found $15,615 in cash and a bankbook. These items were photographed before being removed from the bureau drawer. The white powder substances found in the bureau and in the defendant's pocket were analyzed at the University of Massachusetts Medical School laboratory. One substance was determined to be 90.96 grams of cocaine and the substance from the defendant's pocket was determined to be 13.77 grams of cocaine. The analysis of another substance removed from the bureau drawer indicated that it did not contain drugs.

At trial, pursuant to G.L. c. 111, § 113,[1] the Commonwealth introduced two certificates of analysis

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[1] General Laws c. 111, § 13, states in relevant part:

> "The analyst or assistant analyst of the . . . University of Massachusetts medical school shall upon request furnish a signed certificate, on oath, of the result of the [chemical] analysis [of a narcotic drug submitted to it by police authorities] . . . and the presentation of such certificate to the court by any police officer . . . shall be prima facie evidence that all the requirements . . . have been complied with. This

from the University of Massachusetts Medical School laboratory showing the weight of the cocaine. The defendant, in turn, submitted the certificate of analysis of the other substance, indicating that it was not a narcotic but rather lidocaine (the dilutant). Although admitting that he had one-half ounce of cocaine on his person, the defendant testified that he only had twenty-eight grams in his bureau. His defense was that the police mixed lidocaine with the cocaine in the bureau into "a big ball" to arrive at the total amount of 90.96 grams.

The defendant's expert went to the University of Massachusetts Medical School laboratory on the first day of the trial to weigh the drugs himself. The expert testified that the first scale he used was not functioning properly, but that he was able to get an accurate reading from a second scale. The total weight of the cocaine, when weighed by the defendant's expert, was 102 grams. He testified that the difference in the amount from the 104.73 grams determined by the chemist was likely due to the evaporation of a "volatile material" mixed with the cocaine. Although the defendant's expert agreed that the total weight was more than one hundred grams, he testified that he thought the concentration of cocaine stated on the

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certificate shall be sworn to . . . and the jurat shall contain a statement that the subscriber is the analyst or an assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and net weight of the narcotic or other drug . . . ."

The purpose of G.L. c. 111, § 13, is to reduce court delays and the inconvenience of having the analyst called as a witness in each case. See *Commonwealth v. Claudio*, 26 Mass. App. Ct. 218, 220 n. 1, 525 N.E.2d 449 (1988), *S. C.*, 405 Mass. 481, 541 N.E.2d 993 (1989), and cases cited.

certificate of analysis was misleading. However, he further testified that he could not determine how inaccurate it might be because he "didn't have enough time to really study all the data" and a piece of data was missing regarding how the analyst made the standard concentrations for quantifying the cocaine in the sample.

The laboratory manager at the University of Massachusetts Medical School, a rebuttal witness for the prosecution, testified that the chemist who analyzed the drugs was unavailable to testify because she was on maternity leave. He further testified that he personally examined the test results as to the purity and weight of drugs and he agreed with the results reported on the certificates.

*Discussion.*

1. *Confrontation clause.* The defendant argues that the admission of the drug certificates of analysis denied him his constitutional right to confrontation because the chemist who analyzed the substances and prepared the certificates did not testify.[2] This issue was presented first to this court in *Commonwealth v. Slavski*, 245 Mass. 405, 140 N.E. 465 (1923), and again nearly fifty years later in *Commonwealth v. Harvard*, 356 Mass. 452, 253 N.E.2d 346 (1969). In both cases, this court held that because the records relating to the analysis of intoxicating liquor or drugs were merely records of primary fact, with no judgment or discretion

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[2] The Commonwealth argues that the defendant failed to preserve this issue for appeal because he did not object at trial. We disagree. The failure to object was excusable, as *Crawford v. Washington*, 541 U.S. 36 (2004) (*Crawford*), was decided after the defendant's trial and the filing of his notice of appeal in the Superior Court.

on the part of the analysts, and were admitted only as prima facie evidence, their admission did not violate a defendant's right to confrontation. See *Commonwealth v. Harvard*, *supra* at 461-463, 253 N.E 2d 346; *Commonwealth v. Slavski*, *supra* at 417-418, 140 N.E. 465. The defendant, however, argues that these cases no longer apply because of the United States Supreme Court's recent decision in *Crawford*, *supra* at 61, 68, holding that "testimonial" hearsay statements are barred under the confrontation clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether the statements are deemed reliable by the court. We disagree with the defendant's proposed application of *Crawford* to evidence of this nature.

Although the Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,' " it provided that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. The Court noted that "[t]hese are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* However, the Court also recognized that "[t]here were always exceptions to the general rule of exclusion" of hearsay evidence and that several were well established when the confrontation clause was enacted. *Id.* at 56. Specifically, the Court suggested in dictum that a business or official record would not be subject to its holding as this exception was well established in 1791. *Id.*[3]

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[3] It appears as though the *Slavski* decision anticipated the *Crawford* holding. *Commonwealth v. Slavski*, 245 Mass. 405, 413-418, 140 N.E. 465

One acknowledged exception to the confrontation clause is a public record, "an ancient principle of the common law, recognized at the time of the adoption of the Constitution." *Commonwealth v. Slavski*, *supra* at 417, 140 N.E. 465, citing J. Wigmore, Evidence §§ 1390-1398 (1923). See *Commonwealth v. Bergstrom*, 402 Mass. 534, 545, 524 N.E.2d 366 (1988) (noting public records and dying declarations as acknowledged exceptions to confrontation requirements when Massachusetts Constitution was adopted). In addition, it is well established in Massachusetts that "a record of a primary fact made by a public officer in the performance of official duty is or may be made by legislation competent prima facie evidence as to the existence of that fact." *Commonwealth v. Slavski*, *supra* at 417, 140 N.E. 465. However, "records of investigations and inquiries conducted, either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible in evidence as public records." *Id.*

Certificates of chemical analysis are neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test determining the composition and quantity of the substance. *Commonwealth v. Harvard*, *supra* at 462, 253 N.E.2d 346. See *Commonwealth v. Westerman*, 414 Mass. 688, 699-700, 611 N.E.2d 215 (1993). Additionally, the certificate is admissible only as prima facie

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(1923). The exhaustive discussion in the *Slavski* decision on the confrontation clause and its well-recognized exceptions, such as dying declarations and public records, closely resembles the discussion of the historical aspects of the confrontation clause in *Crawford*.

evidence of the composition, quality, and weight of the substance, G.L. c. 22C, § 39, which a defendant may rebut if he doubts its correctness, as the defendant did in this case. Accordingly, these drug certificates are well within the public records exception to the confrontation clause.[4]

Furthermore, we do not believe that the admission of these certificates of analysis implicate "the principal evil at which the Confrontation Clause was directed . . . particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, *supra* at 50. The documentary evidence at issue here has very little kinship to the type of hearsay the confrontation clause intended to exclude, absent an opportunity for cross-examination. *Id.* at 51-53. Rather, it is akin to a business or official record, which the Court stated was not testimonial in nature. *Id.* at 56.

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[4] Other jurisdictions confronting this issue have reached similar conclusions. See *Perkins v. State*, 897 So.2d 457, 462-465 (Ala.Crim.App.2004) (autopsy report admissible under business records exception); *Smith v. State*, Ala. Crim. App., 898 So.2d 907, 910-911 (2004) (autopsy report is business record and not testimonial but should not have been admitted without coroner's testimony because report contained opinion); *People v. Johnson*, 121 Cal. App. 4th 1409, 1411-1413, 18 Cal. Rptr. 3d 230 (2004) (laboratory report is routine documentary evidence that does not violate confrontation clause); *State v. Thackaberry*, 194 Or. App. 511, 516, 95 P.3d 1142 (2004) (laboratory report of urinalysis was "analogous to-or arguably even the same as-a business or official record").

However, two jurisdictions have reached a contrary conclusion. See *Las Vegas v. Walsh*, 120 Nev. 392, 91 P.3d 591, 595, modified, 100 P.3d 658 (Nev.2004) (affidavit made by nurse, pursuant to statute, was testimonial and not admissible to show presence of alcohol in blood because affidavit was prepared solely for prosecution's use at trial); *People v. Rogers*, 8 A.D.3d 888, 891-892, 780 N.Y.S.2d 393 (2004) (blood test report prepared by private laboratory in anticipation of litigation was not admissible as business report).

In this case, the only defense was that, while the defendant possessed cocaine, he did not have more than one hundred grams of cocaine. The defendant was free to rebut the information in the certificate, and indeed did so. The substance itself was available for the defendant's expert to weigh and analyze. Having done so, the defendant's expert testified that there were over one hundred grams of cocaine.[5] He disputed only the purity of the cocaine as recorded on the certificate. Contrary to the defendant's argument, the analyst was not required to testify simply because the defendant offered evidence to rebut the certificate. Rather, as the judge properly instructed, the jury were free to credit this testimony and to discredit the certificate of analysis as they saw fit. Therefore, we conclude the defendant's confrontation rights were not violated.

2. *Other issues.* The defendant also claims errors in the prosecutor's closing statements and argues that his defense counsel was ineffective.

a. *Prosecutor's closing remarks.* The defendant argues that the prosecutor created a substantial risk of

---

[5] As long as the mixture contains cocaine (which it did) and weighs in excess of the threshold amount (which it also did), the purity of the cocaine need not be proved to establish the offense of trafficking. G.L. c. 94C, § 32E(*b*)(3). See *Commonwealth v. James*, 30 Mass. App. Ct. 490, 493 n. 4, 570 N.E.2d 168 (1991), *S. C.*, 411 Mass. 1106, 587 N.E.2d 790 (1992). The purity of the substance may be relevant as circumstantial evidence that substances are possessed with an intent to distribute, and not for personal use. See *Commonwealth v. Johnson*, 413 Mass. 598, 603-604, 602 N.E.2d 555 (1992); *Commonwealth v. Sabetti*, 411 Mass. 770, 779, 585 N.E.2d 1385 (1992); *Commonwealth v. Montanez*, 410 Mass. 290, 305-306, 571 N.E.2d 1372 (1991).

a miscarriage of justice by violating the bounds of proper closing argument. Additionally, the defendant argues that these errors were prejudicial in light of two objectionable statements that the prosecutor made during the trial.[6] As no objection was made to the prosecutor's closing argument, we limit our review to whether there was a substantial risk of a miscarriage of justice. See *Commonwealth v. Fitzgerald*, 376 Mass. 402, 416, 381 N.E.2d 123 (1978). We analyze the prosecutor's remarks considering the argument as a whole, the judge's instructions to the jury, and the evidence at trial. *Commonwealth v. Beland*, 436 Mass. 273, 289, 764 N.E.2d 324 (2002), citing *Commonwealth v. Mello*, 420 Mass. 375, 380, 649 N.E.2d 1106 (1995). However, as the defendant fails to cite authority supporting his specific claims of error, these arguments warrant only brief discussion.

First, the defendant argues that the prosecutor improperly vouched for the credibility of two witnesses by commenting on their integrity when telling the jury, "[Y]ou heard from Officer Williams and you heard from Officer Burgos, and I suggest to you that they are two fine police officers who have very calm demeanors

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[6] When the Commonwealth asked the defendant whether his assets had been seized by the State, the judge immediately instructed the jury that the issue had "absolutely nothing to do with this case" and they should "[p]ut [the issue] out of your mind . . . ." Later, the judge sustained the defendant's objection when the Commonwealth asked the defendant how many years he had been selling cocaine. The judge further instructed that the question was improper and excluded. The judge's immediate curative instructions in these instances remedied whatever error (if any) arose in these questions. *Commonwealth v. Lodge*, 431 Mass. 461, 471-472, 727 N.E.2d 1194 (2000).

. . . ." While the characterization of the witnesses as "fine police officers" would have been better left unsaid, it was not reversible error. See *Commonwealth v. Kozec*, 399 Mass. 514, 521, 505 N.E.2d 519 (1987) ("It is not improper to make a factually based argument that, due to the demeanor, disclosed circumstances, and appearance of a witness, a particular witness should be believed or disbelieved"). Moreover, the judge gave detailed instructions on the jury's role in determining the credibility of each witness, specifically instructing them to "use your own good sound common sense and judgment, and . . . come to your own conclusion as to the credibility of any of the witnesses."

The defendant also argues that the prosecutor improperly attempted to shift the burden to him by suggesting that the defendant had a motive to testify. This argument is without merit, as the prosecutor was properly arguing that, having taken the witness stand, the defendant was subject to cross-examination with respect to his underlying motives for testifying.

Next, the defendant argues that the prosecutor erred in attempting to instruct the jury on the elements of the charged offense. Again, this argument is without merit. When the prosecutor began describing the offense of possession to the jury, the judge interrupted to state that he would explain the law to the jury and directed the prosecutor to go ahead with the facts. As the prosecutor did not have the opportunity to state the elements of the crime charged, the defendant was not prejudiced and there was no error.

Last, the defendant argues that the prosecutor misstated the evidence by remarking that the cocaine had been evaporating.[7] As evidenced by the transcript, the prosecutor, in the next sentence, clarified that it was understandable that the volatile substance mixed with the cocaine would eventually evaporate over time. Taken in context, that statement was correct and there was no error.

Having reviewed the closing argument, as well as the judge's instructions to the jury and the relevant portions of the transcript, we conclude that the prosecutor's closing argument as a whole did not create a substantial risk of a miscarriage of justice.

b. *Ineffective assistance of counsel.* The defendant also argues that his defense counsel rendered ineffective assistance by failing adequately to prepare for trial, to pursue certain discovery regarding the procedures and methods used by the Commonwealth to analyze the drug mixture, accurately to recount in her closing argument the expert witness's testimony concerning the changing weight of the drug mixture, and to object to the prosecutor's improper comments and questions during closing argument. We disagree. In order to prevail on a claim of ineffective assistance,

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[7] "Both, both chemists . . . testified they were not surprised that with the passage of four years, that the cocaine has evaporated. And I thought that was a very good example that [the defense expert] used with the perfume, because it makes it comprehendible, it makes it understandable that in fact the cocaine has been mixed with a substance. [The defense expert] called it volatile, as did [the laboratory manager]. That ultimately when it's touched by the air or when it's transferred, when it's weighed, that it eventually evaporates with the passage of time, and that's what happened."

The actual testimony was that there was a "volatile material in the sample" that was evaporating.

the defendant bears the burden of proving that the behavior of counsel fell below that of an ordinary, fallible lawyer and that such failing "likely deprived the defendant of an otherwise available, substantial ground of defence." *Commonwealth v. Saferian*, 366 Mass. 89, 96, 315 N.E.2d 878 (1974). Concerning the first three alleged errors, the defendant has stated, in a cursory fashion without citation to authority, what he perceived to be the errors of his attorney but failed to submit any analysis supporting his claims of error. Accordingly, the defendant failed to show how his counsel's actions fell below the level of an ordinary, fallible attorney or how he was prejudiced. Furthermore, as there was no reversible error in the prosecutor's closing argument, it was not ineffective assistance of counsel to fail to object. See *Commonwealth v. Murphy*, 442 Mass. 485, 509, 813 N.E.2d 820 (2004).

*Conclusion.*

Because we conclude that the certificates of analysis at issue in this case are akin to a business or official record, and therefore, would not be subject to the holding in the *Crawford* case, and because we find no merit in the other claims of error, we affirm the defendant's conviction.

*So ordered.*

## APPENDIX D

**[State's Exhibit 10]**

**The Commonwealth of Massachusetts**
**Executive Office of Health and Human Services**
**Department of Public Health**
**State Laboratory Institute**
**305 South Street**
**Boston, MA 02130-3597**
**617-983-6622**

**DATE RECEIVED**: 11/19/2001
**DATE ANALYZED**: 11/28/2001

**No.** 615742
**I hereby certify that the** substance
**Contained in** 2 plastic bags **MARKED**: 615742
**Submitted by** P.O. FRANK MCDONOUGH of the BOSTON POLICE DEPT.

**Has been examined with the following results**:
The substance was found to contain:
Cocaine, a derivative of Coca leaves, as defined in Chapter 94 C, Controlled Substance Act, Section 31, Class B.

**NET WEIGHT**: 2.41 grams
**DEFENDANT**: MONTERO, ELIS A. ET AL

_____/s/_____/s/_____
Assistant Analysts Della Saunders Michael Lawler

Sworn and subscribed to before me on this day, 12-04-01. I know the subscribers to be assistant analysis of the Massachusetts Department of Public Health.

My Commission Expires 8-25-06 _____/s/_____
NOTARY PUBLIC

Chapter 111, Section 13 of the General Laws
This certificate shall be sworn to before a justice of the Peace or Notary Public, and the jurat shall contain a statement that the subscriber is an analyst or assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or the assistant analyst, and of the face that he/she is such.

**[State's Exhibit 11]**

**The Commonwealth of Massachusetts**
**Executive Office of Health and Human Services**
**Department of Public Health**
**State Laboratory Institute**
**305 South Street**
**Boston, MA 02130-3597**
**617-983-6622**

**DATE RECEIVED**: 11/19/2001
**DATE ANALYZED**: 11/28/2001

**No.** 615743
**I hereby certify that the** substance
**Contained in** 2 plastic bags **MARKED**: 615743
**Submitted by** P.O. FRANK MCDONOUGH of the BOSTON POLICE DEPT.

**Has been examined with the following results**:
The substance was found to contain:
Cocaine, a derivative of Coca leaves, as defined in Chapter 94 C, Controlled Substance Act, Section 31, Class B.

**NET WEIGHT**: 2.34 grams
**DEFENDANT**: MONTERO, ELIS A. ET AL

_____/s/_____/s/_____
Assistant Analysts Della Saunders Michael Lawler

Sworn and subscribed to before me on this day, 12-04-01. I know the subscribers to be assistant analysis of the Massachusetts Department of Public Health.

My Commission Expires 8-25-06 _____/s/_____
NOTARY PUBLIC

Chapter 111, Section 13 of the General Laws
This certificate shall be sworn to before a justice of the Peace or Notary Public, and the jurat shall contain a statement that the subscriber is an analyst or assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or the assistant analyst, and of the face that he/she is such.

**[State's Exhibit 13]**

**The Commonwealth of Massachusetts**
**Executive Office of Health and Human Services**
**Department of Public Health**
**State Laboratory Institute**
**305 South Street**
**Boston, MA 02130-3597**
**617-983-6622**

**DATE RECEIVED**: 11/19/2001
**DATE ANALYZED**: 11/28/2001

**No.** 615741
**I hereby certify that the** powder
**Contained in** 19 plastic bags **MARKED**: 615741
**Submitted by** P.O. FRANK MCDONOUGH of the BOSTON POLICE DEPT.

**Has been examined with the following results**:
The powder was found to contain:
Cocaine, a derivative of Coca leaves, as defined in Chapter 94 C, Controlled Substance Act, Section 31, Class B.

**NET WEIGHT**: 22.16 grams
**DEFENDANT**: MONTERO, ELIS A. ET AL

_____/s/_____/s/_____
Assistant Analysts Della Saunders Michael Lawler

Sworn and subscribed to before me on this day, 12-04-01. I know the subscribers to be assistant analysis of the Massachusetts Department of Public Health.

My Commission Expires 8-25-06 _____/s/_____
NOTARY PUBLIC

Chapter 111, Section 13 of the General Laws

This certificate shall be sworn to before a justice of the Peace or Notary Public, and the jurat shall contain a statement that the subscriber is an analyst or assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or the assistant analyst, and of the face that he/she is such.

# OPPOSITION BRIEF

Supreme Court, U.S.
FILED
FEB 5 - 2008
OFFICE OF THE CLERK

No. 07-591

IN THE
# Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,
*Petitioner,*

*v.*

COMMONWEALTH OF MASSACHUSETTS,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Petitioner claims that the admission of drug analysis certificates at his state-court trial for cocaine trafficking and distribution violated his Sixth Amendment right to confront witnesses against him. Should certiorari be denied where (1) the certificates were merely cumulative of substantial other evidence establishing the composition and weight of the drugs; (2) Petitioner failed to avail himself of available state procedures that could have eliminated any Sixth Amendment questions; (3) the state courts properly determined that the certificates were not "testimonial" evidence simply because they were prepared for use at trial; and (4) only a handful of courts have adopted the bright-line rule urged by Petitioner, which would hinder the administration of justice, without any gain in the truth-seeking process?

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## INTRODUCTION

The Commonwealth of Massachusetts respectfully requests that the Court deny the petition for a writ of certiorari. This case is a poor vehicle to resolve the important constitutional question presented. Although Petitioner objected to the admission of the drug analysis certificates at trial, his defense was grounded on the theory that there was no evidence to link the drugs to him. Consistent with this theory, Petitioner did not object to testimony from experienced narcotics officers and other witnesses that the drugs were, in fact, cocaine. Nor did he object when the narcotics officers estimated the weight and value of the cocaine. The trial judge, in all events, instructed the jury that they were free to disregard the certificates of analysis entirely. Thus, even if the state court erred in admitting the drug analysis certificates, the error would not have changed the result below.

Moreover, to the extent Petitioner challenges the reliability of the testing methods reflected in the drug analysis certificates or the qualifications of the analysts who conducted the testing, certiorari should be denied because Petitioner waived these claims by failing to raise them in the manner required by state law. Indeed, had Petitioner complied with the established state-law procedures for raising these claims, any constitutional questions could have been obviated.

This case also is a poor vehicle for resolution of the constitutional question presented because the

underlying decision is an unpublished decision of the Commonwealth's intermediate appellate court, with no precedential value. Petitioner and *Amici* use this case merely as a vehicle for challenging the Massachusetts Supreme Judicial Court's decision in *Commonwealth v. Verde*, 444 Mass. 279, 827 N.E.2d 701 (2005). In *Verde*, the Supreme Judicial Court held that drug analysis certificates are not within the rule announced in *Crawford v. Washington*, 541 U.S. 36 (2004), because they are "nontestimonial" statements akin to business or official records. *Verde*, 444 Mass. at 284, 827 N.E.2d at 706.

Although not all courts agree with *Verde*'s reasoning, Petitioner exaggerates the scope and depth of the conflict that exists. The majority of courts, like *Verde*, have followed a case-by-case approach to determining whether a particular statement is testimonial or nontestimonial. Only a handful of courts have adopted the bright-line rule urged by Petitioner, which would render testimonial – and, thus, subject to the Confrontation Clause – all laboratory reports prepared for use at trial. This interpretation of the Confrontation Clause would impose enormous burdens in countless criminal cases by needlessly requiring live testimony from laboratory technicians who are unlikely to have any independent recollection of one – out of the thousands – of tests they routinely perform.

Also, only two years have passed since the Court, in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266 (2006), clarified *Crawford*'s distinction between testimonial and nontestimonial statements.

The passage of time and opportunity for further percolation in the lower courts will assist the Court in assessing the far-reaching consequences that a decision in this case might have on criminal prosecutions throughout the country.

## STATEMENT

A Massachusetts jury convicted Petitioner of distributing and trafficking in cocaine in violation of Mass. Gen. Laws ch. 94C, § 32A and § 32E(b)(1).[1] The facts supporting Petitioner's convictions are detailed in the state appeals court's decision. Petr.'s App. 1a-5a. Additional facts are set forth below in response to specific allegations contained in Petitioner's Statement.

Petitioner and his codefendant, Ellis Montero, sold cocaine to Thomas Wright in the parking lot of a retail store. Petr.'s App. 1a, 6a-7a. Two batches of cocaine were introduced at trial. Petr.'s App. 3a n.1, 4a n.2. The first batch consisted of 4 bags of cocaine that the arresting officer, Detective Robert Pieroway, seized from Wright. Petr.'s App. 3a. The second batch consisted of 19 bags of cocaine that the police found in the backseat area of the cruiser used to

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[1]Mass. Gen. Laws ch. 94C, § 32A prohibits, in relevant part, any person from knowingly or intentionally distributing cocaine. Section 32E(b)(1) prohibits any person from trafficking in cocaine by "knowingly or intentionally" possessing with intent to distribute a "net weight of [14] grams or more" of a mixture containing cocaine.

transport Petitioner, Montero, and Wright following their arrests. Petr.'s App. 4a.

**A. Petitioner's trial strategy.**

At trial, Petitioner did not contest that the drugs recovered from Wright and the backseat area of the cruiser were cocaine. Instead, his strategy was to convince the jury that there was no evidence directly linking him – as opposed to Wright or Montero – to the drugs. *See* Tr. 1:79; Tr. 3:17, 19-20, 23-24. Petitioner also did not contest the amount of the drugs. As Petitioner's counsel argued in closing: "[T]he amount of drugs isn't in question. What is in question is who possessed those drugs." Tr. 3:23.

**B. The 4 bags of cocaine seized from Wright.**

Consistent with this strategy, Petitioner failed to object to testimony establishing that the drugs recovered from Wright and the backseat area of the cruiser were, in fact, cocaine. *See* Tr. 2:79-80, 98-99. Wright, for instance, "told Pieroway that he had four bags of cocaine on his person." Petr.'s App. 3a; Tr. 2:113-14. Pieroway then searched Wright and recovered "a plastic bag that contained four clear white plastic bags of cocaine [from Wright's] front right pocket." Petr.'s App. 3a; Tr. 2:74. Pieroway had seen cocaine similar to this "in excess of two thousand times" during his career. Tr. 2:74, 76. Each bag had a "little knot tied on it that open[ed] up," Tr. 2:76, and appeared to be "at least gram size." Tr. 2:74. Pieroway also identified Exhibits 8 and 9 as "[t]he cocaine that we recovered from Mr.

Wright." Tr. 2:79-80. Petitioner did not object to any of this testimony.

Sergeant Detective Paul Murphy, an expert on street-level drug dealing, likewise testified – without objection – that the 4 bags recovered from Wright contained cocaine. Tr. 1:105-08; Tr. 2:79-80. According to Murphy, the bags were all "about the same size" and appeared to contain the "same amount of cocaine." Tr. 1:107. The store loss prevention officer likewise testified – without objection – that Pieroway recovered from Wright "four small bags of a white powder substance that appeared to be cocaine." Tr. 2:35.

### C. The 19 bags of cocaine recovered from the backseat area of the cruiser.

Petitioner also did not dispute at trial that the 19 bags recovered from the backseat area of the cruiser contained cocaine. Pieroway testified – again without objection – that, after Petitioner, Montero, and Wright got out of the cruiser, a police officer found "a plastic bag that contained [19] plastic bags of cocaine" in the area where they were sitting. Tr. 2:97. The bags were tied with a knot and contained a "white powder" that Pieroway "believed to be cocaine." Tr. 2:100. Moreover, each bag "appeared to be the same size and same packaging, same looks, everything as the four [bags] that [he had] recovered from Mr. Wright." Tr. 2:100, 102; Petr.'s App. 5a. The 19 bags, Pieroway concluded, were "identical" to those recovered from Wright, and the color of the cocaine appeared to be uniform. Tr. 2:100-01.

Murphy likewise testified – without objection – that the 19 bags recovered from the backseat area of the cruiser contained cocaine. Tr. 1:108-09; Tr. 2:97-99. In addition, he confirmed that the 19 bags "look[ed] to be about the same size bags" as those recovered from Wright. Tr. 1:108.

The police officer who found the 19 bags of cocaine also testified – without objection – that he "observed some drugs," specifically a "white powder substance," in a plastic bag in the back of the cruiser. Tr. 2:165-66; *see also* Tr. 2:100-01 (Pieroway testifying that "[c]ocaine is white"). His partner testified – also without objection – that this substance was "cocaine." Tr. 2:204.

**D. The street-level drug market.**

In addition to the direct testimony establishing that the drugs were cocaine, the Commonwealth presented circumstantial evidence as well. At the time of Petitioner's arrest, cocaine was "packaged primarily in plastic bags, a corner of a sandwich bag . . . and the amount [was] put in there and wrapped and knotted and cut off." Tr. 1:96; Tr. 2:101. The packaging of the cocaine recovered from Wright and the backseat area of the cruiser was consistent with how cocaine ordinarily was packaged for sale. Tr. 2:101-02.

The price of a bag of cocaine varied according to the amount of cocaine in the bag. Tr. 1:96-97. At the time of Petitioner's arrest, a $40 bag contained .40 grams of cocaine. Tr. 1:97. Based on their

knowledge of the drug market, Pieroway and Murphy agreed that the 4 bags of cocaine seized from Wright and the 19 bags of cocaine recovered from the backseat area of the cruiser were worth $80 to $100 each. Tr. 1:106-09; Tr. 2:83, 102.

Murphy further testified that, based on his experience in conducting hundreds of drug surveillance operations, drug dealers operating at the time of Petitioner's arrest frequently conducted their transactions in cars to avoid detection. Tr. 1:87, 90-93. The dealers would pick up the buyer in their car and then "take basically a meaningless ride" for a short distance to complete the transaction. Tr. 1:91-92. Petitioner and Montero's sale to Wright fit this profile. Petr.'s App. 1a-4a.

Drug dealers, at the time of Petitioner's arrest, also frequently relied on pagers and cell phones to maintain contact and arrange drug sales. Tr. 1:93. And, following their arrest, police often found that dealers possessed cash in a variety of denominations. Tr. 1:94. During the booking process, police recovered two cell phones and $301 from Montero, and a pager and $157 from Petitioner. Petr.'s App. 4a. In addition, police found $320 on the ground outside the cruiser – "the same amount that Wright had paid for his purchase of the [4] bags of cocaine. . ." *Id.* at 4a-5a.

**E. The drug analysis certificates.**

Notwithstanding the substantial – and unobjected-to – evidence establishing the

composition and weight of the drugs recovered from Wright and the backseat area of the cruiser, Petitioner's counsel objected, cursorily citing *Crawford*, when the Commonwealth asked Pieroway the results of analysis conducted on the bags. Tr. 2:81, 98. The judge overruled the objection and admitted the certificates. Tr. 2:81-82, 97-98; App. 24a-29a. The certificates confirmed that the 4 bags recovered from Wright contained 4.75 grams of cocaine, Tr. 2:82-83; Petr.'s App. 24a-27a, and that the 19 bags recovered from the backseat area of the cruiser contained 22.16 grams of cocaine.[2] Tr. 2:98, Petr.'s App. 28a-29a.

The certificates were prepared and admitted at trial pursuant to Mass. Gen. Laws ch. 111, §§ 12-13. Section 12 requires the Massachusetts Department of Public Health to "make . . . a chemical analysis of any narcotic drug . . . when submitted to it by police authorities . . . provided, that it is satisfied that the analysis is to be used for the enforcement of law." Section 13, in turn, provides that an "analyst or an assistant analyst of the department . . . shall upon request furnish a signed certificate, on oath, of the result of the [chemical] analysis [of a narcotic drug submitted to

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[2]On cross-examination, Pieroway agreed that, apart from the laboratory reports, he had no "real knowledge" of what was in the bags. Tr. 2:120. But, he confirmed, once again, that the substances looked liked drugs to him. *Id.* This concession, therefore, did not detract from the weight of Pieroway's other testimony or that of other witnesses who identified the substances as cocaine.

it by police authorities]." Section 13 further states that the "presentation of such certificate to the court by any police officer . . . shall be prima facie evidence that all the requirements [of section 12] have been complied with." The certificate must be sworn and contain a statement identifying the subscriber as an analyst or assistant analyst of the department. Mass. Gen. Laws ch. 111, § 13. "When properly executed, [the certificate] shall be prima facie evidence of the composition, quality, and the net weight of the . . . drug . . . analyzed." *Id.*

Section 13 is intended "to simplify proof of chemical analyses performed routinely and accurately by a public agency and 'to reduce court delays and the inconvenience of having busy public servants called as witnesses'" in every case where drug analysis evidence is presented. *Commonwealth v. Johnson*, 32 Mass. App. Ct. 355, 357, 589 N.E.2d 328, 330 (1992) (internal citations omitted). When its requirements are met, the certificate is "admissible only as prima facie evidence of the composition . . . and weight of the substance . . . , which a defendant may rebut if he doubts its correctness. . . ." *Verde*, 444 Mass. at 284, 827 N.E.2d at 705; *see also Commonwealth v. Harvard*, 356 Mass. 452, 462, 253 N.E.2d 346, 352 (1969) ("If the defendant doubted the correctness of the certificates in any respect it was open to him to rebut them, but he did not pursue this course."). As prima facie evidence, the certificate "carries no particular presumption of validity." *Commonwealth v. Berrio*, 43 Mass. App. Ct. 836, 837, 687 N.E.2d 644, 645 (1997). Rather, "the weight to be accorded [it] is 'a

matter left entirely to the jury's discretion.'" *Id.* (citation omitted). The jury, if it so chooses, may disregard the certificate entirely, even when no contrary evidence is presented. *Id.* at 838, 687 N.E.2d at 646. Here, the trial judge twice admonished the jury that they were free to disregard the certificates. Tr. 3:69, 80.

**F. Petitioner's undeveloped arguments in his state-court appeal.**

In his brief on appeal, Petitioner argued that the admission of the drug analysis certificates violated his Sixth Amendment rights and that "*Verde* was contrary to the holding in *Crawford*." Petr.'s State Ct. Br. 38-39. Except for what the state appeals court described as these "simple assertions," Petr.'s App. 8a n.3, Petitioner's argument was undeveloped and barely sufficient under Massachusetts practice. *See Commonwealth v. Bowler*, 407 Mass. 304, 310, 553 N.E.2d 534, 537 (1990) (arguments "not supported by reasoned theory or citation" are not proper appellate argument and may be disregarded). In a footnote to its unpublished decision, the state appeals court rejected Petitioner's assertions as being "without merit." Petr.'s App. 8a n.3.

Thereafter, Petitioner repeated essentially the same undeveloped arguments in his application for discretionary review by the state's highest court. *See id.* at 11a. That court denied without comment Petitioner's application. *Id.*

## G. Petitioner's factual misstatements.

1. Petitioner incorrectly asserts that the drug analysis certificates were the *only* evidence offered at trial to establish that the 19 bags recovered from the backseat area of the cruiser contained cocaine. Pet. 19. As detailed above, there was substantial additional evidence establishing that these bags contained cocaine. Statement at 5-6.

2. Nor is there any merit to Petitioner's assertion that the two batches of cocaine lacked a common source. Pet. 20. Pieroway's testimony on this point was unequivocal: the two batches were "identical." Tr. 2:100; Petr.'s App. 5a. Moreover, to the extent Petitioner belatedly disputes Pieroway's testimony about the color or appearance of the cocaine, *see* Pet. 6-7, 19-20, the jury resolved those issues against him. As the state appeals court explained: "the jury had available to them all the seized packages of cocaine" and, thus, could evaluate for themselves this "disputed question of fact." Petr.'s App. 10a.

3. Petitioner correctly states that, where multiple samples of drugs are submitted for analysis, the state laboratory may perform representative testing on the samples. *See* Pet. 4, 19 (citing *Commonwealth v. Shea*, 28 Mass. App. Ct. 28, 33, 545 N.E.2d 1185, 1189 (1989)). But, there is no indication that the testing here was performed in this manner. And, even if representative testing had been performed here, there was nothing improper in doing so given Pieroway's testimony that the two batches of cocaine were uniform in appearance and

packaging. *See Shea*, 28 Mass. App. Ct. at 33, 545 N.E.2d at 1189. Petitioner, in all events, failed to object to the drug analysis certificates on this basis at trial. *See* Tr. 2:81, 98.

4. Petitioner states that the Commonwealth need not call "as witnesses the forensic analysts who prepare the [certificates], even if defendants request that they do so." Pet. 5, 18. But, he neglects to mention that he never requested that the Commonwealth call the analysts. Nor did he seek to rebut in any way the correctness of the certificates, as was his right. *See Verde*, 444 Mass. at 284, 827 N.E.2d at 705. He did not, for instance, call his own expert or subpoena the analysts to testify at trial. *See id.*; Mass. R. Crim. P. 17. In addition, as detailed below, Petitioner failed to follow available state-court procedures for challenging any perceived deficiencies in the testing methods reflected in the certificates. *See* Pet. 6-7, 16-17.

5. Petitioner incorrectly states that the drugs were submitted to the "state crime lab" for analysis. Pet. 6. As noted on the face of the exhibits, however, the certificates were prepared by the Department of Public Health's State Laboratory Institute. *See* Petr.'s App. 24a-28a.

6. Petitioner also distorts the fair import of the trial judge's instructions about the drug analysis certificates. Contrary to Petitioner's allegations, the judge did not merely instruct the jury that the "laboratory reports alone permitted it to conclude that the bags the officers seized contained cocaine."

*See* Pet. 8. Instead, in considering whether the Commonwealth established that petitioner was guilty of trafficking in cocaine, the judge instructed the jury that they "may consider all the relevant evidence you had in the case about what that substance was." Tr. 3:69. The drug analysis certificates, the judge instructed, should be considered "with all other evidence in deciding whether or not the Commonwealth ha[d] met its burden of proving that this was, in fact, cocaine." *Id.* Furthermore, the judge cautioned that "from that certificate of analysis *you're permitted but you're not required to conclude that the substance was cocaine. It is entirely up to you to decide.*" *Id.* (emphasis added).

Shortly thereafter, the judge provided a substantially similar instruction in connection with the distribution charge: "The first element requires proof beyond a reasonable doubt that the substance [Petitioner] allegedly distributed was cocaine . . . . I refer again to the certificate of analysis for your review, keeping in mind that *you are permitted but not required to conclude that it was cocaine* based on that certificate and any mixture of cocaine will suffice for distribution." Tr. 3:80 (emphasis added).

## REASONS FOR DENYING THE PETITION

### A. Certiorari should be denied because resolution of the constitutional issue would not change the outcome of Petitioner's trial.

Certiorari should be denied when resolution of a constitutional question is not likely to change the result reached below. *See* Eugene Gressman, et al., *Supreme Court Practice* § 4.4(f), at 248 (9th ed. 2007) (citing *Sommerville v. United States*, 376 U.S. 909 (1964)). As the Court observed: "While this Court decides questions of public importance, it decides them in the context of meaningful litigation" that has practical significance to the parties. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

Here, even accepting that a significant conflict existed among federal courts of appeal and the highest state courts regarding the admissibility of drug analysis certificates, resolution of that conflict likely would not change the jury's verdict.. This is because, at trial, petitioner did not contest that the drugs recovered from Wright and the backseat of the cruiser were cocaine or how much the cocaine weighed. Statement at 3-6. Instead, his defense was premised on the theory that there was no evidence linking him to the drugs. *Id.*

Moreover, under Massachusetts law, "[p]roof that a substance is a particular drug need not be made by chemical analysis and may be made by circumstantial evidence." *Commonwealth v.*

*Dawson,* 399 Mass. 465, 467, 504 N.E.2d 1056, 1057 (1987). Experienced police officers, for instance, may testify "as to what drug a particular substance was." *Id.* Here, the Commonwealth presented testimony from two experienced narcotics officers (and other witnesses) establishing the composition and weight of the drugs. *See* Statement at 4-7. Petitioner never challenged the expertise of these officers or objected to their testimony that the 4 bags seized from Wright and the 19 bags recovered from the backseat area of the cruiser each contained "at least" a gram of cocaine. *See id.*; *Commonwealth v. Paniaqua,* 413 Mass. 796, 802, 604 N.E.2d 1278, 1282 (1992) ("jurors could credit the officers' beliefs that the white powdery substance was cocaine").

The drug analysis certificates were cumulative of this substantial other evidence and did not factor heavily in the case. The prosecutor, in fact, never directly referred to the certificates in his closing argument. *See* Tr. 3:35-51. His only references to the certificates were indirect and passing, by commenting that: (1) the 4 bags of cocaine seized from Wright had been "analyzed as such" and (2) the cocaine recovered from the backseat area of the cruiser weighed 22.16 grams. Tr. 3:38-39. Petitioner did not object to either of these statements. *Id.* In addition, any impact that these passing references had on the jury was easily outweighed by the trial judge's explicit instructions – repeated in connection with both the trafficking and distribution charges – that the jury was free to disregard the certificates entirely. Tr. 3:69, 80.

On this record, resolution of whether Petitioner's Confrontation Clause rights were violated by the admission of the drug analysis certificates is largely academic because the error, if any, was harmless beyond a reasonable doubt. *See Delaware v. Van Arsdall,* 475 U.S. 673, 681 (1986) (alleged Confrontation Clause violations are subject to harmless-error analysis). The certificates did not factor heavily in the prosecution's case, they were cumulative of other evidence presented, and the overall case against Petitioner was very strong. *See id.* at 684. This case, therefore, presents a poor vehicle for resolving the important constitutional question raised by the Petition.

**B. Certiorari should be denied because, to the extent Petitioner challenges the reliability of the testing methods, his claims are waived.**

Petitioner and *Amici* highlight recent scandals at laboratories across the country that, they say, call into question the reliability of laboratory test results and underscore the need for cross-examination of technicians in all cases where forensic evidence is presented. *See* Pet. 16-18. More particularly, Petitioner complains that, under Massachusetts law, he had no opportunity to challenge the reliability of the testing methods reflected in the drug analysis certificates or the qualifications of the analysts who conducted those tests.[3] *See id.* at 6-7, 18. Petitioner,

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[3]Petitioner also complains that the certificates did not specify the percentage of cocaine present in the samples. Pet. 7. But, "[a]s long as the mixture contains cocaine (which it did) and weighs in excess of the threshold amount (which it also

however, waived these claims by failing to raise them in the manner required by state law.

Under Massachusetts law, a party seeking to challenge the reliability of scientific evidence must file a pretrial motion *in limine* and request an evidentiary hearing on the admissibility of the evidence. *Commonwealth v. Arroyo*, 442 Mass. 135, 145, 810 N.E.2d 1201, 1210 (2004). At this "inherently fact-intensive" hearing, the trial judge acts as "gatekeeper," screening out unreliable scientific methods and "assess[ing] the credibility of [the] various expert witnesses in determining whether proposed scientific testimony is reliable." *Canavan's Case*, 432 Mass. 304, 312, 733 N.E.2d 1042, 1049 (2000); *see also Commonwealth v. Lanigan*, 419 Mass. 15, 25-26, 641 N.E.2d 1342, 1349 (1994) (adopting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). The "judge's gatekeeper role . . . includes the obligation to determine whether the testing at issue was conducted properly [and not just whether the testing method is theoretically reliable]." *Commonwealth v. McNickles*, 434 Mass. 839, 850, 753 N.E.2d 131, 140 (2001). Thus, a defendant – like Petitioner here – who claims that a particular scientific test was not "properly performed" or that the expert was not qualified to perform the test – must file a pretrial motion,

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did), the purity of the cocaine need not be proved to establish the offense of trafficking." *Verde*, 444 Mass. at 285, n.5, 827 N.E.2d at 706. Nor was the purity of the cocaine an element of the distribution charge. *See* Tr. 3:80-81 (judge instructing jury that "any mixture of cocaine will suffice for distribution. It doesn't have to be in pure form.").

challenging the admissibility of that evidence. *Id.; see also Commonwealth v. Patterson,* 445 Mass. 626, 648, 840 N.E.2d 12, 28-29 (2005) ("the procedure that we adopted in *Lanigan* includes ensuring not only the reliability of the abstract theory and process underlying an expert's opinion, but the particular application of that process").

Had Petitioner followed these well-established state-court procedures, the constitutional question raised by the Petition could have been obviated. [4] The trial judge either would have accepted or rejected Petitioner's claims that the analysts were not qualified and that the testing methods were flawed. If the judge accepted the claims, she would have excluded the certificates from evidence. If the judge rejected the claims, petitioner nevertheless would have been afforded an opportunity to cross-examine the individual analysts, leaving only the issue of the analysts' unavailability for trial. *See Crawford,* 541 U.S. at 59.

Petitioner, however, failed to follow these established state-court procedures and, consequently, waived any objections he may have had to the "reliability of the testing and the conclusions reached." *Arroyo,* 442 Mass. at 145, 810 N.E.2d at 1211; *see also Commonwealth v. Bly,* 448 Mass. 473, 489, 862 N.E.2d 341, 355 (2007) (failure

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[4]Petitioner also failed to pursue available means for obtaining pretrial discovery of all documentation relevant to the scientific testing reflected in the drug analysis certificates. *See* Mass. R. Crim. P. 14(a)(2).

to raise issue in pretrial motion "waived its consideration on the question of admissibility"). This waiver constitutes an independent and adequate state-law bar to certiorari review on any questions relating to the reliability of the testing methods reflected in the certificates or the qualifications of the analysts who conducted the tests. *See Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.").

### C. Certiorari should be denied because the state courts correctly decided the constitutional issue raised by the Petition.

In all events, certiorari should be denied because the state courts correctly decided the constitutional issue raised by the Petition. Relying on the Supreme Judicial Court's decision in *Verde*, the state appeals court held that admission of the drug analysis certificates, without live testimony from the analysts who prepared those certificates, did not violate Petitioner's Sixth Amendment rights.[5] Petr.'s App. 8a, n.3. It also correctly rejected Petitioner's "simple assertions" that *Verde* is contrary to *Crawford*. *Id.*

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[5]The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This procedural guarantee applies to state prosecutions. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

Under *Crawford*, the crucial determination for Confrontation Clause analysis is whether the out-of-court statement is testimonial or nontestimonial. *Crawford*, 541 U.S. at 51, 68. Only testimonial statements are subject to the Confrontation Clause; nontestimonial statements, "while subject to traditional limitations upon hearsay evidence, [are] not subject to the Confrontation Clause." *Davis*, 126 S. Ct. at 2273. This is because the text of the Sixth Amendment reflects an "especially acute concern with a specific type of out-of-court statement." *Crawford*, 541 U.S. at 51; *see also White v. Illinois*, 502 U.S. 346, 365 (1992) (the Confrontation Clause was aimed "only" at a "discrete category" of "formalized testimonial materials" and should "not be construed to extend beyond the historical evil to which it was directed") (Thomas, J., concurring in part and concurring in the judgment). That concern is with "[o]nly" those statements that cause a declarant to be a "witness" against the accused. *Davis*, 126 S. Ct. at 2273.

A witness, the Court has explained, is a person who "bear[s] testimony." *Crawford*, 541 U.S. at 51. "'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* (quoting Noah Webster, *An American Dictionary of the English Language* (1828)). Thus, "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* Barring such testimony from evidence except where the witness is unavailable and the defendant has an

opportunity for cross-examination, avoids the "principal evil" that the Confrontation Clause was intended to prevent: the "civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[6] *Id.* at 50.

Where, in contrast, "nontestimonial hearsay is at issue, it is wholly consistent with the Framer's design" to afford states latitude to develop their own hearsay rules of admissibility concerning such statements. *Id.* at 68. Although the Court did not define the scope of what evidence falls into this "nontestimonial" category, it indicated that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records. . . " *Id.* at 56. Additionally, Chief Justice Rehnquist, in his concurring opinion, noted that "the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official records. . . . To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process." *Id.* at 76 (Rehnquist, C.J., concurring).

The Court provided some additional guidance on the distinction between testimonial and nontestimonial statements in *Davis*. There, the

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[6]The Court recently reaffirmed that the principal purpose of the *Crawford* test was to restore "the [Framer's] original understanding of the meaning of the Confrontation Clause," rather than to enhance the "fundamental fairness and accuracy" of criminal proceedings. *Whorton v. Bockting*, 127 S. Ct. 1173, 1182 (2007).

Court applied the rule announced in *Crawford* to two cases concerning 911 calls and initial police investigation. *Davis*, 126 S. Ct. at 2270-73. Although the Court again declined "to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial," it explained that:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.* at 2273-74. The Court also identified several indicia useful in determining whether, objectively viewed, the "primary purpose" of a hearsay statement may be said to be testimonial. Among these indicia are: (1) whether the statement was about "events *as they were actually happening,* rather than 'describing past events'"; (2) whether any reasonable listener would recognize that the caller was facing an "ongoing emergency"; (3) whether what was asked and answered was, viewed objectively, "necessary to be able to resolve the present emergency, rather than simply to learn . . .

what had happened in the past"; and (4) the "level of formality" of the interview. *Id.* at 2276-77 (emphasis in original).

Measured against these standards, Petitioner argues that drug analysis certificates are testimonial because they are formal statements prepared at the request of the police for use in a criminal trial and not in connection with any emergency. Pet. 4, 13, 24-25. Petitioner notes that, in *Crawford,* the Court included a statement "made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial" as one possible formulation of the "core class of 'testimonial' statements." *Crawford,* 541 U.S. at 51-52. Seizing on this language, Petitioner and *Amici* contend that *Crawford* established a bright-line rule, holding that any formal statement, including a sworn drug analysis certificate, prepared for use at trial is testimonial and, thus, subject to the Confrontation Clause. *See* Pet. 4, 13, 24-25.

The Court, however, never endorsed this or any other specific formulation of what is a testimonial statement. *Davis,* 126 S. Ct. at 2273; *see also State v. Carter,* 326 Mont. 427, 114 P.3d 1001, 1007 (2005). Instead, a statement's possible use at trial "was but one of several considerations that *Crawford* identified as bearing on whether evidence is testimonial. None of the factors was deemed dispositive." *People v. So Young Kim,* 368 Ill. App. 3d 717, 720, 859 N.E.2d 92, 94 (2006).

*Davis* "confirms that the proper focus [about whether an out-of-court statement is testimonial] is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial." *People v. Geier*, 41 Cal. 4th 555, 605, 161 P.3d 104, 139, *petition for cert filed*, No. 07-7770 (U.S. Nov. 14, 2007); *see also State v. O'Maley*, 932 A.2d 1, 10 (N.H.), *petition for cert. filed*, No. 07-7577 (U.S. Nov. 7, 2007). As the Seventh Circuit explained: "it cannot be that a statement is testimonial in every case where a declarant reasonably expects that it might be used prosecutorially." *United States v. Ellis*, 460 F.3d 920, 926-27 (7th Cir. 2006); *accord United States v. Feliz*, 467 F.3d 227, 236 (2d Cir. 2006) ("where a statement is properly determined to be a business record . . . it is not testimonial within the meaning of *Crawford*, even where the declarant is aware that it may be available for later use at trial"). If this were the standard, the Court in *Davis* would have held that the 911 call from the victim reporting a domestic disturbance was testimonial because a reasonable person would know that the result of such a call would be the arrest and prosecution of the perpetrator. *Ellis*, 460 F.3d at 926; *see also Geier*, 41 Cal. 4th at 605,161 P.3d at 139 (same); *O'Maley*, 932 A.2d at 10 (same). *Davis*, thus, "confirms that the critical inquiry is not whether it might be reasonably anticipated that a statement will be used at trial but the circumstances under which the statement was made." *Geier*, 41 Cal. 4th at 607, 161 P.3d at 140.

Massachusetts adheres to this "cautious case-by-case approach" in resolving questions of admissibility in the wake of *Crawford* and *Davis*. *See Commonwealth v. DeOliveira*, 447 Mass. 56, 66, n.10, 849 N.E.2d 218, 226 (2006); *see also Commonwealth v. Galicia*, 447 Mass. 737, 741, 857 N.E.2d 463, 467 (2006) ("Both *Crawford* and *Davis* counsel that the determination whether a statement is testimonial or nontestimonial . . . is highly dependent on the context in which the statement was made."). This approach makes sense because, as the Illinois Supreme Court stated, "it would be fruitless to attempt to provide an exhaustive list of factors which may potentially enter into the 'testimonial' calculus and the weight to be accorded them." *People v. Stechly*, 225 Ill.2d 246, 296, 870 N.E.2d 333, 363 (2007). "Each case must be resolved on its own merits, and a pertinent factor in one case may not carry much weight in another." *Id.; see also O'Maley*, 932 A.2d at 12 ("While bright line tests may be easy to administer and 'bring[] clarity and predictability. . . . we believe that the Court's decision in *Davis* requires a case-by-case approach.") (internal citations omitted).

Here, several factors support the conclusion that drug analysis certificates are nontestimonial, notwithstanding that the analysts probably knew their test results would be used as evidence in a criminal prosecution. *See* Mass. Gen. Laws ch. 111, §§ 12-13. *Crawford* itself "suggested in dictum that a business or official record would not be subject to its holding as this exception was well established in 1791." *Verde*, 444 Mass. at 283, 827 N.E.2d at 705

(citing *Crawford*, 541 U.S. at 56). One "ancient principle of common law, recognized at the time of the adoption of the Constitution," allows "record[s] of a primary fact made by a public officer in the performance of official duty" to be admitted as "prima facie evidence as to the existence of that fact." *Id.* (citing *Commonwealth v. Slavski*, 245 Mass. 405, 417, 140 N.E. 465, 469 (1923)). Drug analysis certificates are "well within" this public records exception. *Id.* at 284, 827 N.E.2d at 705.

Analysts employed by the Department of Public Health are required by law to perform chemical tests on drugs and certify the results of those tests when requested to do so. *See* Mass. Gen. Laws ch. 111, §§ 12-13. In carrying out these official duties, the analysts – like the declarant reporting the emergency in *Davis* – were not acting as witnesses and were not testifying. *See Davis*, 126 S. Ct. at 2277. Instead, they were state officials simply recording the "results of a well-recognized scientific test" that the law required them to perform in the ordinary course of the department's business. *See Verde*, 444 Mass. at 283, 827 N.E.2d at 705. Thus, these statements are "akin to a business or official record, which [are] not testimonial in nature." *Id.* at 284; 140 N.E.2d at 706; *see also United States v. De La Cruz*, Nos. 06-1659/072515, 2008 WL 273970, at **9-10 (1st Cir. Feb. 1, 2008) (autopsy report prepared in the ordinary course of business pursuant to an obligation imposed by law is nontestimonial and, thus, not subject to *Crawford*); *Ellis*, 460 F.3d at 926-27 (medical records establishing the presence of

drugs in defendant's system were "statements that by their nature were not testimonial").

The certificates also were nontestimonial because they did not relate a past fact of history as would be done by a witness. *See Davis*, 126 S. Ct. at 2276-77. In *Davis*, for instance, the Court concluded that the transcript of a 911 call, in which the caller identified the defendant as the person assaulting her, did not contain "testimonial statements," requiring the prosecution to present the declarant in court. *Id.* "Rather than describing past events," the statements by the 911 caller were "speaking about events as they were actually happening." *Id.* The purpose of the 911 call, the Court observed, was "to meet an ongoing emergency" and the caller was not testifying as a "witness" or in a form that would be a "weaker substitute for live testimony" about events witnessed. *Id.* at 2277.

Similarly, the certificates here were nontestimonial because they were not relating past events but, instead, the current condition of the substances being tested. *Cf. United States v. Washington*, 498 F.3d 225, 232 (4th Cir.) (laboratory test results showing presence of PCP and alcohol in defendant's blood were not testimonial because "they were not relating past events but the current condition of the blood in the machines"), *petition for cert. filed*, No. 07-8291 (U.S. Dec. 14, 2007); *Geier*, 41 Cal. 4th at 606,161 P.3d at 140 (in determining whether a statement is nontestimonial, the "crucial point is whether the statement represents the contemporaneous recordation of observable events").

The only assertions of fact contained in the certificates were the weight and composition of the substances tested. *See* Petr.'s App. 24a-29a. Neither of these assertions made any "links to the past." *Cf. Geier*, 41 Cal. 4th at 606, 161 P.3d at 140.

Moreover, had the analysts been called to testify, they "would merely have authenticated the document" and likely would have been "unable to recall from actual memory information related to [the certificate's] specific contents. . . ." *O'Maley*, 932 A.2d at 13. Thus, like the 911 call in *Davis*, the certificates were not a "weaker substitute for live testimony at trial." *See Davis*, 126 S. Ct. at 2277.

In addition, the certificates did not "implicate 'the principal evil at which the Confrontation Clause was directed.'" *Verde* (quoting *Crawford*, 541 U.S. at 50). "In *Crawford*, this referred to the "'historical practice of justices of the peace or other court officials questioning witnesses, *ex parte*, and then merely reading the witnesses' statements into evidence.'" *O'Maley*, 932 A.2d at 12-13 (citation omitted). Unlike today, these magistrates performed an "essentially investigative and prosecutorial function." *Id.* The certificates were not prepared under any circumstances approaching this historical practice. Although the police requested that the certificates be prepared, the scientific testing recorded on the certificates was performed in a non-adversarial setting. The police did not question the analysts regarding Petitioner, nor probe them for information about the underlying crimes based on the analysts' personal knowledge. Thus, none of the

"factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime" was implicated here. *See State v. Dedman*, 136 N.M. 561, 568, 102 P.3d 628, 635 (2004).

Lastly, the certificates did not accuse Petitioner of any crime. "*Crawford* emphasized that a principal aim of the Confrontation Clause is to protect a criminal defendant from accusations of criminal wrongdoing." *O'Maley*, 932 A.2d at 13 (quoting *Michels v. Commonwealth*, 47 Va. App. 461, 470, 624 S.E.2d 675, 680 (2006)). "Records of laboratory protocols followed and the resulting raw data acquired are not accusatory. 'Instead, they are neutral, having the power to exonerate as well as convict.'" *Geier*, 41 Cal. 4th at 607,161 P.3d at 140 (quoting *State v. Forte,* 360 N.C. 427, 435, 629 S.E.2d 137, 143, *cert. denied*, 127 S. Ct. 557 (2006)); *see also O'Maley,* 932 A.2d at 14 ("results generated from the blood test were neutral, as the tests could have led either to incriminatory or exculpatory results"). Thus, the "documentary evidence at issue here has very little kinship to the type of hearsay the confrontation clause intended to exclude, absent an opportunity for cross-examination." *Verde*, 444 Mass. at 284, 827 N.E.2d at 706. Or, as some respected commentators observed: a chemist's certification that a "substance is cocaine" does not "look much like the 'accusations' of crime" that are the "core concern of the Confrontation Clause." 30A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 6371.2 (Supp. 2007); *but see United States v. Moon,* Nos. 05-

4506/06-1840, 2008 WL 43585, at *2 (7th Cir. Jan. 3, 2008) (non-testifying chemist's conclusion that substance was cocaine was testimonial, but data underlying that conclusion were nontestimonial).

**D. Certiorari should be denied because Petitioner exaggerates the conflict among courts about whether lab reports are subject to *Crawford*.**

Certiorari also should be denied because the conflict among courts about whether the results of laboratory testing are testimonial or nontestimonial is not as broad or deep as Petitioner contends. *See* Pet. 10-11. The majority of state supreme courts and federal circuit courts to address this issue have held that laboratory reports prepared for trial are nontestimonial *See, e.g., De La Cruz*, Nos. 06-1659/072515, 2008 WL 273970, at **9-10 (autopsy report nontestimonial); *Washington*, 498 F.3d at 229-30 (drug-alcohol analysis from chromatograph machine nontestimonial); *Ellis*, 460 F.3d at 926-27 (blood-urine test results nontestimonial); *Feliz*, 467 F.3d at 237 (autopsy report nontestimonial); *State v. Crager*, Nos. 06-0294/06-0298, 2007 WL 4569702, at **13-14 (Ohio Dec. 27, 2007) (DNA report nontestimonial); *O'Maley*, 932 A.2d at 13-24 (blood test results nontestimonial); *Geier*, 41 Cal. 4th at 607, 161 P.3d at 140 (DNA report nontestimonial); *Forte*, 360 N.C. at 435, 629 S.E.2d at 143 (serology report nontestimonial); *State v. Craig*, 110 Ohio St. 3d 306, 320-21, 853 N.E.2d 621, 638 (2006) (autopsy report nontestimonial), *cert. denied*, 127 S. Ct. 1374 (2007); *Dedman*, 136 N.M. at 569, 102 P.3d at 636 (blood test report nontestimonial); *State v. Cutro*,

365 S.C. 366, 378, 618 S.E.2d 890, 896 (2005) (autopsy report nontestimonial). In determining that laboratory reports were nontestimonial, these courts, consistent with *Crawford* and *Davis*, considered all of the surrounding circumstances, not just that the reports were prepared for possible use at trial. *See id.*

In contrast, only a handful of courts have disagreed with *Verde* or reached contrary conclusions. *See, e.g., Moon,* Nos. 05-4506/06-1840, 2008 WL 43585, at *2 (non-testifying chemist's conclusion that substance was cocaine was testimonial but no plain error in its admission); *Hinojos-Mendoza v. People*, 169 P.3d 662, 667 (Colo. 2007) (drug test report testimonial); *State v. March*, 216 S.W.3d 663, 665-66 (Mo.) (same), *cert. dismissed*, No. 06-1699 (U.S. Oct. 5, 2007); *State v. Caulfield*, 722 N.W.2d 304, 309 (Minn. 2006) (same); *Thomas v. United States*, 914 A.2d 1, 12-15 (D.C. 2006) (same), *cert. denied*, 128 S. Ct. 241 (2007); *Las Vegas v. Walsh*, 121 Nev. 899, 124 P.3d 203, 208 (2005) (chain-of-custody affidavit from nurse who drew defendant's blood testimonial), *cert. denied*, 547 U.S. 1071 (2006). These courts reached their conclusions by relying on a bright-line test similar to that urged by Petitioner and *Amici* here. *See, e.g., Hinojos-Mendoza*, 169 P.3d at 667 (laboratory report testimonial because there could be "no serious dispute that the sole purpose of the report was to analyze the substance found in [defendant's] vehicle in anticipation of criminal prosecution"). As shown above, however, that test "focuses too narrowly on the question of whether a document may be used in

litigation. This was but one of several considerations that *Crawford* identified as bearing on whether evidence is testimonial." *So Young Kim*, 368 Ill. App. 3d at 720, 859 N.E.2d at 94.

Furthermore, the conflict among courts is not as entrenched as Petitioner believes. Not even two years have passed since the Court, in *Davis*, further clarified *Crawford* -- a decision issued only four years ago. In the meantime, the range of scientific evidence potentially subject to the Confrontation Clause continues to expand. *See* Jennifer L Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y 791, 810-11 (2007). The "perspective of time" may help shed more light on the important constitutional question posed by this Petition. *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting). Allowing further percolation in the lower courts also will assist the Court in fully evaluating the ramifications that a decision in this case might have on criminal prosecutions throughout the country. *See* Gressman et al., *Supreme Court Practice* § 6.37(i)(1), at 503-04 ("The more important an issue is, the more the Court would benefit by allowing the issue to percolate so it may avail itself of the wisdom of other courts before settling a momentous matter.").

The Commonwealth, in fact, is aware of several other pending petitions for certiorari review relating to the admission of laboratory test reports allegedly in violation of defendants' Confrontation Clause rights. *See, e.g.*, *Washington*, 498 F.3d 225,

*petition for cert. filed,* No. 07-8291 (U.S. Dec. 14, 2007) (blood test results for alcohol and PCP); *Geier,* 41 Cal.4th 555, 161 P.3d 104, *petition for cert. filed,* No. 07-7770 (U.S. Nov. 14, 2007) (DNA test results); *O'Maley,* 932 A.2d 1), *petition for cert. filed,* No. 07-7577 (U.S. Nov. 7, 2007) (blood test results). Further analysis of this complicated issue by lower courts is appropriate because a new federal constitutional rule requiring live witness testimony in all cases involving laboratory testing would have enormous ramifications on countless federal and state criminal prosecutions. If the Court chose to address this issue now, however, a decision in one of these other cases might be of more practical significance to the parties than it would be here on the record described above. *See The Monrosa,* 359 U.S. at 184 (certiorari improvidently granted where resolution "can await a day when . . . [question] is posed less abstractly").

These considerations are particularly important given Petitioner's barebones arguments in the state appellate courts. *See Petr.'s* App. 8a n.3. Although his arguments were minimally sufficient to confer jurisdiction under 28 U.S.C. § 1257(a), Petitioner nevertheless did not provide the Supreme Judicial Court with any reasoned basis for reexamining its decision in *Verde.* Principles of comity require that the Supreme Judicial Court be afforded a full and fair opportunity – on a more developed record than presented here – to reconsider *Verde* and, if necessary, remedy any potential Confrontation Clause violation associated with the challenged statutory scheme. *See Adams v. Robertson,* 520 U.S. 83, 90 (1997) (principles of

comity require that state courts be given a fair opportunity to consider proposed changes that could obviate a federal constitutional challenge).

### E. Certiorari should be denied because the bright-line rule proposed by Petitioner threatens the administration of justice.

Further, certiorari should be denied because the bright-line rule urged by Petitioner and *Amici* threatens the efficient administration of justice. In their view, anytime the results of scientific testing are prepared for possible use at a criminal trial – including, DNA analysis, microscopic hair analyses, fingerprint identifications, autopsy reports, ballistics tests, drug analysis, and other tests not yet imagined – the Confrontation Clause requires the prosecution to present live testimony from the actual technician who performed the testing. *See* Pet. 4, 15, 21. The *only* exception would be if the technician is unavailable and there has been a prior opportunity for cross-examination. *See Crawford,* 541 U.S. at 59. As detailed above, *Crawford* and *Davis* do not support this result, and adoption of such a rule would wreak havoc on criminal prosecutions across the county, without any gain in the truth-seeking process.

According to one study, crime laboratories received approximately 2.7 million requests for forensic laboratory services during 2002. Bureau of Justice Statistics, Federal, State, and Local Crime Lab Backlog Reached 500,000 in 2002 (2005), <http:www.ojp.usdoj.gov/bjs/pub/press/cpffcl02pr.ht

m>. Testing of controlled substances was the most frequently requested type of forensic laboratory service requested during the year, accounting for approximately half of all requests submitted. *Id.* In Massachusetts alone, the Department of Public Health estimates that it analyzes between 38,000 to 40,000 drug samples each year. *See* Brief for the Attorney General and Department of Public Health as Amici Curiae Supporting the Commonwealth, *Commonwealth v. Verde*, No. SJC-09320, 2004 WL 3421947, at *5 (2004).

To reduce court delays and the burden of having the laboratory personnel called as witnesses in every criminal case where forensic evidence is at issue, the vast majority of jurisdictions in the United States have adopted statutes that "explicitly permit the introduction of some kinds of routinely generated expert evidence by forensic scientists" without the need for live testimony. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y at 797. Indeed, according to one recent study, only six jurisdictions have failed to enact similar legislation. *Id. at n.15.*

Even proponents of the bright-line rule urged by Petitioner, including some *Amici,* concede that "[i]t may be a significant drain on limited forensic science budgets to require that every forensic science test be presented in court by whoever actually performed the test, unless that examiner is unavailable and the defendant had a prior opportunity for cross-examination." Mnookin, *Expert Evidence and the Confrontation Clause After*

*Crawford v. Washington*, 15 J.L. & Pol'y at 836. As one court explained: "'To have forensic scientists traveling across [the state] to testify in every case involving forensic evidence, even in those cases in which the opposing party has no intention of challenging the forensic evidence, would greatly reduce the amount of time those scientists have to actually conduct the examinations and analyses and would cause even more delays in the criminal justice system.'" *Pruitt v. State*, 954 So.2d 611, 615 (Ala. Crim. App. 2006) (quoting *Brown v. State*, 939 So.2d 957, 960-61 (Ala. Crim. App. 2005)); *accord Napier v. State*, 827 N.E.2d 565, 567 (Ind. Ct. App. 2005) (it would be "unreasonable" to require a witness to routinely testify that the operator of a breathalyzer machine was certified and the machine was in good working order), *cert. denied*, 546 U.S. 1215 (2006).

This burden is particularly unnecessary "where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action." *People v. Johnson*, 121 Cal. App. 4th 1409, 1413, 18 Cal. Rptr. 3d 230, 233 (1st Dist. 2004) (internal citations omitted); *see also* Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y at 836 (bright-line application of *Crawford* may "seem particularly nonsensical when there is little chance that the actual declarant, the author of the forensic report, will still have an independent memory of conducting the test by the time of trial. . . ."). That, of course, is precisely the

situation with the routine laboratory tests at issue here. *See Verde*, 444 Mass. at 283, 827 N.E.2d at 705.

The bright line rule urged by Petitioner and *Amici* also could result in substantial injustice. Years can pass between the preparation of a scientific report and the trial of a perpetrator. *See People v. Durio*, 794 N.Y.S.2d 863, 869, 7 Misc. 3d 729, 736 (N.Y. Sup. Ct. 2005). By the time of trial, the scientist who prepared the report may have moved, changed professions, or even died. *See id.* As the Supreme Court of Kansas noted, excluding an autopsy report because the medical examiner who conducted the autopsy is unavailable or dead at the time of trial would be an unduly "harsh" result. *State v. Lackey,* 280 Kan. 190, 213, 120 P.3d 332, 351 (2005), *cert. denied*, 547 U.S. 1056 (2006); *see also Rollins v. State,* 392 Md. 455, 496, 897 A.2d 821, 845 (it would be "unacceptable in practical application" to interpret *Crawford* as precluding the admission of an autopsy report when the author dies before trial), *cert. denied*, 127 S. Ct. 392 (2006).

Similar concerns would be at play when the analyst who performed a drug test is no longer available to testify at the time of trial. "If that were the situation, would the [drug] tests have to be redone, even though there are no questions about the accuracy of the tests, and there are no indications of any discrepancies?" *Crager, Nos. 06-0294/06-0298,* 2007 WL 4569702, at *15. It would be "incongruous" to require such a result. *Id.* Indeed, there are many cases – Petitioner's included – where

"the key issue at trial does not at all relate to the reliability of the forensic evidence." Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y at 859. Thus, to require live testimony in every case where drug testing evidence is involved "may well be a significant waste of resources." *Id.* It would, as Chief Justice Rehnquist said, needlessly require the prosecution to present "numerous additional witnesses without any apparent gain in the truth-seeking process." *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring).

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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# REPLY BRIEF

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IN THE

# Supreme Court of the United States

Luis E. Melendez-Diaz,
*Petitioner,*

v.

Massachusetts

On Petition for a Writ of Certiorari
to the Appeals Court of Massachusetts

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF FOR PETITIONER

The Commonwealth acknowledges that this case raises an "important constitutional question" over which state supreme courts and federal courts of appeals are deeply divided: whether state forensic laboratory reports prepared for criminal prosecutions are testimonial evidence. BIO 1, 30-31. The Commonwealth contends, however, that (1) the conflict should be allowed to percolate even longer; (2) that this case is an unsuitable vehicle for resolving the question presented; and (3) that the decision below is correct. None of these arguments provides any reason to delay resolving this escalating split of authority.

1. The conflict of authority over the testimonial nature of crime laboratory reports is intractable and needs to be resolved now. Since the filing of the petition, the conflict over the issue has grown in state courts of last resort and federal courts of appeals to six-to-six. *See* Pet. 9-15; *United States v. Moon*, 512 F.3d 359 (7th Cir. 2008) (drug lab reports testimonial); *State v. Crager*, 879 N.E.2d 745 (Ohio 2007) (divided opinion: DNA reports not testimonial). If one includes under the umbrella of the question presented the cases the Commonwealth cites respecting a forensic laboratory's machine-generated data and respecting autopsy reports, this brings the conflict to ten-to-six. *See* BIO 30-31.[1]

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[1] This count leaves aside the Seventh Circuit's decision in *United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006), given that court's holding in *Moon* that forensic reports just like those here are testimonial. None of the other jurisdictions the Commonwealth cites has addressed a situation exactly like the one here.

The notion that this split of authority should be allowed to percolate longer is hard to take seriously. The Commonwealth suggests that courts should be given more time to digest this Court's decision in *Davis v. Washington*, 126 S. Ct. 2266 (2006). BIO 32. But since *Davis* was decided, state courts of last resort and federal courts of appeals – using the Commonwealth's collection of cases – already have divided *six-to-four* over the issue. Furthermore, not one of the courts that decided the issue prior to *Davis* has found it necessary to revisit its position.

Indeed, Petitioner asked the Supreme Judicial Court of Massachusetts in this case to reconsider *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005), in light of *Davis*. *See* Pet. 8. The court refused to do so, and has refused to do so, in accordance with the Commonwealth's wishes, in numerous other post-*Davis* cases.[2] The time clearly has come for this Court to settle the deepening confusion regarding this Court's explication of the Sixth Amendment.

2. This case is an excellent vehicle to resolve the question whether forensic laboratory reports prepared for criminal prosecutions are testimonial. Although the Commonwealth offers a scattershot of supposed

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[2] *See Commonwealth v. Castro*, 877 N.E.2d 1286 (Mass. App. 2007) (unpublished opinion), *rev. denied*, ___ N.E.2d ___ (Mass. Jan. 31, 2008); *Commonwealth v. Jackson*, 877 N.E.2d 641 (Mass. App. 2007) (unpublished opinion), *rev. denied*, ___ N.E.2d ___ (Mass. Jan. 31, 2008); *Commonwealth v. Jackson*, 863 N.E.2d 583 (Mass. App.) (unpublished opinion), *rev. denied*, 868 N.E.2d 132 (Mass. 2007); *Commonwealth v. Franco*, 846 N.E.2d 792 (Mass. App.) (unpublished opinion), *rev. denied*, 850 N.E.2d 583 (Mass. 2006).

impediments to this Court's reaching this Sixth Amendment issue, none has any force.

a. The Commonwealth's suggestion (BIO 33-34) that petitioner did not give the Massachusetts courts an adequate opportunity to address his Confrontation Clause argument is baseless. Petitioner objected to the introduction of the reports at trial, specifically citing *Crawford v. Washington*, 541 U.S. 36 (2004), and the trial court overruled those objections. Tr. 2/81, 2/98. Petitioner renewed the *Crawford* argument in the Appeals Court of Massachusetts, even though the Massachusetts Supreme Judicial Court's *Verde* decision was binding on that court, and the Appeals Court rejected the argument on the merits. Pet. App. 8 n.3. And petitioner unsuccessfully sought review in the Massachusetts Supreme Judicial Court, arguing that "*Verde* is contrary to the holding in *Crawford* and the United States Supreme Court's post-*Verde* decision in *Davis v. Washington* because the primary purpose of the analyses was to produce evidence for use in a criminal prosecution." Pet. for Further Appellate Review 15-16. Even the Commonwealth concedes that these actions are sufficient to trigger this Court's jurisdiction. BIO 33; *see also Lilly v. Virginia*, 527 U.S. 116, 123 (1999); *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988). These actions also expended more than enough defense resources on an argument that depended on the Supreme Judicial Court reconsidering its recent and controlling precedent with which several other state courts of last resort agree.

b. The Commonwealth suggests that this Court should decline to hear petitioner's constitutional claim

because state law afforded him a pretrial procedure to challenge "the reliability of the testing methods reflected in the drug analysis certificates." *See* BIO 1, 16-19. This suggestion misapprehends the nature of the Confrontation Clause. The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination" before the jury. *Crawford,* 541 U.S. at 61; *see also Taylor*, 484 U.S. at 410 & n.14. Petitioner asserted his right to this procedure, and the Massachusetts courts denied it. The fact that petitioner might have been able to contest the substantive reliability of the testing methods used to produce the certificates in a pretrial *Daubert*-type hearing is beside the point.

c. Nor is the Commonwealth correct that other cases currently pending in this Court might frame the question presented better than this one. *See* BIO 32-33. In *People v. Geier,* 161 P.3d 104 (Cal. 2007), *pet'n for cert. filed,* No. 07-7770, the California Supreme Court, unlike the Massachusetts appellate courts in this case, found that "any error" in admitting the forensic report at issue "was harmless." *Id.* at 140. Furthermore, in *Geier, United States v. Washington,* 498 F.3d 225 (4th Cir. 2007), *pet'n for cert filed,* No. 07-8291, and *State v. O'Maley,* 932 A.2d 1 (N.H. 2007), *pet'n for cert filed,* No. 07-7577, forensic examiners actually testified at trial. Those cases, therefore, raise only the issue of whether the testifying examiners could rely on certain reports and machine-generated data to support their expert opinions. Here, by contrast, the Commonwealth never placed any forensic examiner on the stand. Instead, the Commonwealth introduced extrajudicial certificates, declaring under

oath that the substances at issue in petitioner's case contained cocaine. *See* Pet. 5. Accordingly, this case more clearly implicates the Confrontation Clause and more cleanly raises the question respecting the testimonial nature of forensic laboratory reports.

d. Finally, the Commonwealth urges this Court to deny review on the ground that the forensic reports it introduced over petitioner's objection were merely "cumulative of other evidence presented" at trial. BIO 16. If that were really so, one would wonder why the Commonwealth insisted on creating an obvious and serious constitutional issue for appeal by introducing them. One also might wonder why the Commonwealth never argued harmless error before its own courts, advancing the argument for the first time in its brief in opposition in this Court. Such unanswered questions illustrate why this Court has adopted a "general custom" of granting certiorari to resolve federal constitutional issues squarely decided by state courts – including confrontation issues specifically – and then "allowing state courts initially to assess the effect of erroneously admitted evidence in light of substantive state criminal law." *Lilly*, 527 U.S. at 139-40.

In any event, the Commonwealth's newly devised harmless-error argument lacks merit. The Commonwealth had to prove as an element of the crimes charged that the substance in the bags it introduced into evidence contained an illegal drug. The Commonwealth notes that Massachusetts law allows a jury to make such a finding based on the testimony of police officers. *See* BIO 15. But the very case cited by the Commonwealth notes that "it would be a rare case in

which a [police officer's] statement that a particular substance looked like a controlled substance would alone be sufficient to support a conviction." *Commonwealth v. Dawson*, 504 N.E.2d 1056, 1057-58 (Mass. 1987). Accordingly, unlike the anticipated trial in *Dawson*, the Commonwealth here introduced *forensic reports* respecting the substances at issue. The jury was instructed – consistent with Massachusetts law rendering such reports "prima facie" evidence of what they assert, *see Commonwealth v. Maloney*, 855 N.E.2d 765, 769-70 (Mass. 2006) – to consider the reports in determining whether the substances contained contraband and that it was "permitted" based on the reports alone to find that they did.[3]

This case was close enough that the trial court took the unusual step of reserving ruling on the defendant's motion for a required finding of not guilty

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[3] The two relevant jury instructions here stated in full: (1) "In considering this element, you may consider all the relevant evidence you had in the case about what the substance was. In particular, you have a certificate of analysis that was marked as an exhibit. That is evidence for your consideration and you should consider that together with all other evidence in deciding whether or not the Commonwealth has met its burden of proving that this was, in fact, cocaine. *So from that certificate of analysis you're permitted but you're not required to conclude the substance was cocaine.* It's entirely up to you to decide." Tr. 3/69 (emphasis added). (2) "The first element requires proof beyond a reasonable doubt that the substance the defendant allegedly distributed was cocaine and I explained to you that is a controlled substance. I refer again to the certificate of analysis for your review, keeping in mind that you are permitted but not required to conclude that it was cocaine based on the certificate . . . ." Tr. 3/80. The jury was never instructed, as the Commonwealth claims, that it was "free to disregard the certificates of analysis entirely." BIO 1.

until after the jury returned its verdict, Tr. 2/227, and it is impossible to say beyond a reasonable doubt that the jury did not rely on the forensic reports in making its findings here. The reports were the only "scientific" or definitive evidence that the prosecution offered to prove that the substances the officers seized contained cocaine. Although the lead officer testified that he "believed" the substances he seized were cocaine, Tr. 2/100, he acknowledged that he had no "real knowledge" in that respect apart from the forensic reports. Tr. 2/120.[4] Unlike in *Dawson*, no officer testified to having ingested the substances the defendant allegedly possessed so as to describe their physiological effects. Nor did the officers even perform any field test.

Finally, cross-examination would have enabled petitioner to explore anomalies in the forensic examiner's conclusory certification that the substance in the nineteen bags supposedly found in the patrol car that transported petitioner to the station contained the same illegal drug as the four bags seized at the K-Mart from Wright. Pet. for Cert. 20. The Commonwealth notes that the lead officer testified that the substances in both batches of bags looked "identical." BIO 11. But this testimony simply underscores the potential flaw in the prosecution's case. The bags themselves were introduced into evidence at trial. And it is undeniable (the Commonwealth does not contend otherwise) that they actually look different. The bags seized from Wright contained a white and light yellow powder, while the ones the officers later supposedly

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[4] The other police officer the Commonwealth cites simply testified, *upon being shown the bags in court*, that they "appear[ed] to be" or "look[ed] like" cocaine. Tr. 1/105, 107-08.

found in the patrol car contained a dark yellow, chunky substance. Accordingly, the fact that the lead officer's testimony was clearly incorrect heightened the need for proper adversarial testing of the state-employed agent who certified that the substances were chemically the same. Such adversarial testing would have been perfectly consistent with petitioner's defense that there was no evidence linking him to the bags the Commonwealth introduced at trial. If the bags the police supposedly found in the patrol car contained a different substance or composition than the ones the officers seized from Wright outside the K-Mart, then the Commonwealth's theory that petitioner sold Wright four bags from a uniform collection of some twenty-three bags appears highly dubious.[5]

3. The Commonwealth, finally, advances several arguments in defense of the holding below that forensic laboratory reports prepared for criminal prosecutions are nontestimonial. Given the depth of the conflict over this issue, it does not really matter at

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[5] To any extent the Commonwealth further suggests that petitioner's current contentions are inconsistent with the defense he put on, the Commonwealth disregards the realities of criminal trials. In run-of-the-mill drug cases in which defendants are represented by appointed counsel, such counsel all-too-often does not conduct an extensive investigation or seriously attack the prosecution's allegations through pretrial motion practice. Instead, defense counsel relies on his or her ability to put the prosecution to its proof at trial and to present a defense that responds to apparent weaknesses in the prosecution's case. Once the trial court here ruled that the Commonwealth could present forensic certificates in place of live testimony respecting the chemical composition of the substances in the bags at issue, defense counsel had little choice but to move away from a line of defense that depended entirely on disputing the alleged contents of the bags.

this stage whether the decision below is on the proper side of the split of authority. In any event, the Commonwealth's "multi-factor" merits argument is unconvincing.

The Commonwealth first describes the drug analysis certificates as "akin to" business records. BIO 25-27. But the petition for certiorari explains why *Crawford*'s reference to the common law's narrow "business record" rule provides no support for treating modern forensic laboratory reports as nontestimonial, *see* Pet. 23-24, and the Commonwealth does not even engage (much less refute) this explanation. The Commonwealth's next asserts that forensic laboratory reports are nontestimonial because they relate "the current condition of the substances being tested." BIO 27. But this argument likewise fails to respond to the petition's explanation as to why it lacks force. *See* Pet. 24-25. The Commonwealth further contends that forensic laboratory reports are nontestimonial because forensic examiners create them in a "non-adversarial setting" and the reports do "not accuse [defendants] of any crime." BIO 28-30. But the *ex parte* nature of the forensic examiner's certifications is part of the problem, *see Crawford*, 541 U.S. at 50, not a salutary aspect of the evidence at issue here. And the certifications, even if not directly accusatory, relate information that unquestionably implicates the Confrontation Clause's fundamental purpose of precluding trial by affidavit. The reports certify on oath that an essential element of the crimes charged is satisfied – namely, that substances seized in connection with petitioner's arrest contained illegal drugs. The reports therefore serve as documentary "testimony" –

specifically designed to substitute for live testimony (*see* Pet. 5) – against him.

Finally, the Commonwealth argues that recognizing forensic laboratory reports as testimonial evidence would "wreak havoc" on administration of criminal justice. BIO 34. This, too, is really a merits argument better left for merits briefing – and an unmeritorious argument at that. This Court has explained repeatedly that the meaning of the Sixth Amendment does not turn on administrative "efficiency." *Blakely v. Washington*, 542 U.S. 296, 313 (2004). "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and [this Court], no less than the state courts, lack[s] authority to replace it with one of [its] own devising." *Crawford*, 541 U.S. at 67. That is presumably why this Court already has assumed in prior opinions that criminal defendants have a right to demand that prosecutors introduce forensic evidence through live testimony subject to cross-examination. *See California v. Trombetta*, 467 U.S. 479, 490 (1984) ("the defendant retains the right to cross-examine the law enforcement officer who administered the [blood-alcohol] test, and to attempt to raise doubts in the mind of the factfinder whether the test was properly administered"); *United States v. Wade*, 388 U.S. 218, 227-28 (1967) (same regarding other forensic tests).

In any event, several states, including California and Illinois, have long required forensic examiners, upon demand from the defense, to testify at trial regarding allegedly incriminating conclusions reached in their laboratories. *See* Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 478 & n.10

(2006); *see also id.* at 481-82 & n.23 (referencing twelve other states that require such testimony if demanded according to certain statutory procedures). Several other states have held that *Crawford* requires this rule. *See* Pet. 12-13. Nothing suggests that the criminal justice system in any of these states has ground to a halt, or even has slowed in processing cases. This is probably because, as the Commonwealth itself explained in a brief to the Massachusetts Supreme Judicial Court in *Verde*:

> [I]t is almost always the case that [forensic laboratory reports] are admitted without objection. Generally, defendants do not object to the admission of drug certificates most likely because there is no benefit to the defendant from such testimony. The testimony of the analyst will only serve to resolve any possibility of reasonable doubt, not only in the identification of the substance as contraband but also as to the weight of the substance for trafficking offenses.

Br. for the Commonwealth as *Amicus Curiae* 7, *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005), *available at* 2004 WL 3421945 (citations omitted).

At the same time, there are certain cases in which defendants wish to put the prosecution to its proof with respect to forensic evidence. And it is a well documented fact that such evidence is sometimes revealed to be incorrect or even deliberately manipulated or fabricated. *See* Br. *Amici Curiae* of Prof. Pamela R. Metzger et al. 12-20 & App. This Court should confirm now that forensic reports are testimonial, not only to ensure that courts protect criminal

defendants' constitutional procedural rights, but also to ensure that investigators and prosecutors face the right incentives to develop such evidence in dependable and upright manners.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

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No. 07-591

IN THE
Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,
*Petitioner,*

v.

MASSACHUSETTS,
*Respondent.*

**On Petition for Writ of Certiorari to the Appeals Court of Massachusetts**

# MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* BY PROFESSORS PAMELA R. METZGER, JENNIFER L. MNOOKIN, AND ANDREW E. TASLITZ, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE INNOCENCE PROJECT, THE NATIONAL COLLEGE FOR DUI DEFENSE, THE COMMITTEE FOR PUBLIC COUNSEL SERVICES, AND THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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**On Petition for Writ of Certiorari to the Appeals Court of Massachusetts**

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

*Amici curiae* include Professors of Law with expertise in issues of forensic science, criminal procedure, and constitutional law, the National Association of Criminal Defense Lawyers ("NACDL"), a non-profit association of criminal defense lawyers with a national membership of more than 10,000 attorneys, the National College for DUI Defense, a non-profit professional organization with approximately 850 members which sponsors or co-sponsors at least four major continuing education programs annually specializing in issues relating to the defense of persons charged with driving under the influence, the Committee for Public Counsel Services, a statewide agency in Massachusetts responsible for the delivery of court-appointed criminal defense services to indigent adults and children facing juvenile or criminal prosecutions, the Massachusetts Association of Criminal Defense Lawyers ("MACDL"),

a non-profit association devoted to protecting the rights of the accused and to serving as a voice for the defense before state and federal courts, and the Innocence Project, a leader in the exoneration of the wrongfully convicted, respectfully request leave of this Court to file the following brief in the above captioned matter. In support of its motion, *Amici* state as follows:

1. The petitioner granted its consent in writing. Petitioner's written consent is being filed simultaneously with this Brief and Motion. Respondent refused consent "as a matter of policy."

2. *Amici* in support of petitioner in this matter represent a unique combination of practitioners who, in trials around the country and in Massachusetts itself, are involved each day with issues surrounding admission of forensic evidence in the form of laboratory reports or summaries, as well as distinguished law professors who have studied how these issues are resolved in a wide variety of jurisdictions. As such, *amici* offer a broad and unique perspective on an important issue of constitutional dimension that affects the conduct of criminal trials at one of its most basic and important levels—the manner in which evidence is presented to fact finders and the ability of the defense to test that evidence. The numerous and diverse *amici* appearing on this brief have worked diligently to file a single brief in the interest of speaking forcefully and efficiently on the Confrontation Clause issues discussed herein.

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## QUESTION PRESENTED

Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford* v. *Washington*, 541 U.S. 36 (2004).

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## INTEREST OF *AMICI CURIAE*

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[1] No counsel for any party authored any part of this brief, and no person or entity, other than *Amici*, has made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *Amici's* intention to file this brief. Accompanying this brief is a letter of consent from Petitioner to its filing.

As scholars training future practitioners and practitioners representing clients, *Amici* have a keen interest in knowing whether and how the Sixth Amendment's Confrontation Clause applies to state forensic examiner reports.[2]

In the wake of *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *Davis* v. *Washington*, 126 S. Ct. 2266 (2006), the most widespread subject of controversy with respect to the confrontation guarantee concerns the constitutionality of allowing the prosecution to introduce state forensic laboratory certifications in lieu of live testimony. This practice poses serious problems because it fundamentally alters the structure of a criminal trial, hampers its truth-seeking function, and ultimately threatens the integrity of our criminal justice system. To delay intervention will perpetuate confusion and facilitate injustice in a substantial number of criminal cases nationwide.

## SUMMARY OF ARGUMENT

*Amici* support Petitioner's reasons for granting the petition in full. *Amici* write separately to explain the practical import of the right to confrontation in operation, where the prosecution must affirmatively present live witness testimony to sustain its burden of proof and the defense, absent a knowing and intelligent waiver, always has the opportunity to confront and cross-examine that witness as it sees fit, if it sees fit. Specifically, *Amici* explain how the

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[2] Professors Metzger, Mnookin and Taslitz have published extensively on topics related to these issues. NACDL has appeared as *amicus curiae* in *Crawford* and also appeared with the Public Defense Service for the District of Columbia as *amicus curiae* in *Davis*.

traditional construction of the confrontation guarantee allocates risks, creates incentives, and ultimately promotes the truth-seeking function of a criminal trial. Statutes such as the one at issue in Massachusetts, which substitute out of court certification for live testimony on dispositive issues of proof, cannot serve these purposes.

*Amici* also write to alert the Court to the systemic problems with unreliable scientific data that coincided with the permissive practice under *Ohio* v. *Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford* v. *Washington*, 541 U.S. 36 (2004), of admitting at trial unconfronted, purportedly reliable information. The demonstrated fallibility of state and federal forensic evidence, particularly when it is regularly exempted from the rigors of adversarial testing, reinforces the importance of the questions presented by Petitioner and militates in favor of this Court's review.

## REASONS FOR GRANTING THE PETITION

### I. THE CONFRONTATION GUARANTEE ENSURES THE FUNDAMENTAL WORKINGS OF OUR ADVERSARIAL CRIMINAL JUSTICE SYSTEM AND ITS TRUTH-SEEKING FUNCTION.

In *Crawford*, this Court decoupled the right to confrontation from hearsay rules and held that a defendant's right to confrontation was implicated whenever the prosecution sought to introduce "testimonial" evidence. But the Court did not expressly resolve, because the issue was not squarely before it, how to determine if forensic evidence is "testimonial" such that the confrontation guarantee must be satisfied.

Traditionally, the Confrontation Clause has been interpreted to require (absent a valid waiver[3]) that the prosecution "confront" a defendant "with" its witnesses in the prosecution's case-in-chief. U.S. Const. amend. VI. Under this construction of the confrontation guarantee, there are always a variety of factors that will impede the admission of erroneous, incomplete, or fraudulent evidence. Indeed, the purpose of the Confrontation Clause is to ensure an opportunity for the defendant to challenge the reliability of the prosecution's evidence. See Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 501 (2006).

The Confrontation Clause operates to provide the defense with procedural devices to challenge the reliability of the evidence presented by the prosecution. Most fundamentally, the prosecution must sustain its burden of proof by presenting inherently revealing, live testimony. Thus, the prosecution, which presumably knows the strengths and weaknesses of its evidence and its witnesses, cannot simply conduct a trial-by-affidavit, putting out-of-court written statements before the fact-finder that say no more and no less than the prosecution wants them to say. Rather, the prosecution is obliged to put a live witness on the stand and bear the risk that this witness may provide, even on direct examination, some information that is inconsistent with prior statements or otherwise damaging to the prosecution's case.

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[3] The traditional system does not require confrontation in every case. It is always the prosecution's prerogative to ask the defense to stipulate to the admission of unconfronted out-of-court statements. However, if the defense declines such a request, the prosecution retains the burden of production and the defense the opportunity for cross-examination.

Moreover, under the traditional system, even when a defendant chooses not to cross-examine a prosecution witness, his right to confrontation still provides an *opportunity* for adversarial testing. Before the prosecution's first witness takes the stand, the traditional system of confrontation and cross-examination gives prosecution witnesses prophylactic incentives to exercise greater care in the creation or maintenance of prosecution evidence—to set up and follow protocols that adhere to best practices, to ensure all staff are properly trained, to properly document everything, and to strive in all ways to operate in a manner that is beyond reproach—and thereby to minimize if not avoid entirely damaging impeachment. See Metzger, 59 Vand. L. Rev. at 501. Similarly, the specter of cross-examination prompts good prosecutors to rigorously vet their cases—to strengthen those cases that do go to trial by thoroughly reviewing the evidence with their witnesses and ensuring that errors, omissions, and oversights will be addressed and remedied before the witness testifies in open court, and to dismiss cases based on flawed evidence before the trial ever begins. Without incentives to encourage scrutiny, the prosecution may unwittingly rely on conclusions that are faulty or without foundation. The prosecution will be less inclined to probe the bases for a report's conclusions—the methodology and protocols the examiner used—because without a realistic probability of confrontation, they will never become an issue at trial.

Even a prudent prosecutor may have little ability to learn more about the forensic examiner and his actions in the case. The report itself is likely to be cursory. Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 Vand. L. Rev. 791,

803 (1991) (lab reports often merely "summarize[ ] the results of an unidentified test conducted by an anonymous technician' (internal quotation and citation omitted)).[4] Therefore, in addition to the lack of incentives, there may be a lack of information for which to question forensic certifications. Prosecutors may rely on such certifications because of their believed reliability, but "[d]ispensing with confrontation" because such reports are "obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Crawford*, 541 U.S. at 62.

Certainly, when the prosecution then calls its witness to the stand, it fulfills a number of the components of the confrontation guarantee, even if the defense chooses not to cross-examine the witness. These benefits include (1) "face-to-face" confrontation with the defendant, *id.* at 57; (2) open presentation of evidence "in the presence of all mankind," Sir William Blackstone, 3 *Commentaries on the Laws of England* 373 (1765-69 ed.) and (3) the fact-finder's first-hand "opportunity [to] observ[e] the quality, age, education, understanding, behavior, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing." *Id.* at 374. Additionally, the combination of

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[4] The defendant is afforded little opportunity to discover a forensic report before trial. *See also* Giannelli, 44 Vand. L. Rev. at 810 n.121 (current rules requiring discovery of scientific reports generally do not specify the information that must be included; suggesting changes that require "(a) a description of the analytical techniques used in the test . . . (b) the quantitative or qualitative results with any appropriate qualifications concerning the degree of certainty surrounding them, and (c) an explanation of any necessary presumptions or inferences that were needed to reach the conclusions" (internal citation omitted)).

being face-to-face with the accused and the possibility of cross-examination will likely deter prosecution witnesses from over-statement and misleading omissions when they are on the stand, especially where they have been instructed that such tactics will likely only backfire. Metzger, 59 Vand. L. Rev. at 501 n.122 ("almost all state employees who may be called to testify in criminal trials receive training" on how to be a good witness).

The timing of the defendant's confrontation right to cross-examination is a critical aspect of adversarial testing, because it ensures that the defendant has a genuine and informed opportunity, to challenge the prosecution's evidence as he sees fit, if he sees fit. The defendant is not obligated to choose whether or how to question the prosecution witness until *after* that witness has testified on direct and after the prosecution has presumably obtained from the witness whatever inculpatory information the witness possesses. At this point, the defense can make an informed decision to cross-examine the prosecution witness to expose holes, inconsistencies, biases, or untruths in the witness' testimony.

Alternatively, the defense may decide to forego cross-examination—for any number of legitimate reasons. It may be that the witness (1) now under oath, failed to testify in a way that undermines the defense, (2) actually testified poorly for the prosecution (and thus favorably for the defense), and might only qualify his answers on cross-examination, or (c) in anticipation of cross-examination, was so scrupulous in his testimony that cross-examination would only emphasize the strength of the prosecution's evidence.

And precisely because the traditional construction of the confrontation right ensures a routine and

uniform opportunity for the defense to confront and cross-examine prosecution witnesses, it creates an incentive structure for the prosecution and its witnesses to ensure at every stage of the prosecution that the evidence is accurate and reliable in order to limit defense opportunities for impeachment. The spectra of cross-examination thus provides an incentive for the prosecution to present a complete warts-and-all picture of its case to "draw the sting" from any attempt at impeachment—which in turn allows the fact-finder to render its verdict with more complete information.

In short, the very structure of the traditional conception of the confrontation guarantee promotes the truth-seeking function of a criminal trial in our adversarial system. But a number of states, Massachusetts among them, and a federal circuit, do not consider forensic laboratory certifications to be testimonial, and thereby do not afford defendants *any* confrontation rights in connection with such evidence.[5] This eviscerates the protections of the

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[5] *See, e.g., United States* v. *Ellis*, 460 F.3d 920, 925 (7th Cir. 2006) (noting that while circumstances of test might lead examiner to believe her report might be used in prosecution, they do not "transform what is otherwise a nontestimonial business record into a testimonial statement implicating the Confrontation Clause"); *People* v. *Geier*, 161 P.3d 104 (Cal. 2007), ("[w]e conclude therefore that the DNA report was not testimonial"), *petition for cert. filed*, No. 07-7770 (U.S. Nov. 14, 2007); *State* v. *Forte*, 629 S.E.2d 137, 143 (N.C.) (laboratory report on DNA test not testimonial because such reports are routine, neutral and do not bear witness against the defendant), *cert. denied*, 127 S. Ct. 557 (2006); *Commonwealth* v. *Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (holding that drug certificates "merely state the results of a well-recognized scientific test determining the composition and quantity of the substance" and are akin to public records); *State* v. *Dedman*, 102 P.3d 628, 636

Confrontation Clause, and makes the prosecutor the only functional "gatekeeper" against the admission of unreliable evidence.

As this Court explained in *Crawford*, while the Confrontation Clause's ultimate goal may be to ensure reliability of evidence, "it is a *procedural* rather than a *substantive* guarantee . . . reflect[ing] a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can *best be determined*." *Crawford*, 541 U.S. at 61 (emphasis added). Reliability cannot "best be determined" in an adversarial system by having the very party in opposition to the defendant—the prosecutor—responsible for the reliability of critical evidence. Statutes that permit forensic certification as prima facie evidence "virtually eliminate judicial inquiry into the reliability of the general scientific methodology or the particular scientific test." Metzger, 59 Vand. L. Rev. at 489.

Upon receiving a forensic certification and choosing whether to present it as evidence, the prosecutor subsumes the role of gatekeeper—deciding whether the evidence is reliable. When, as here, the certification is presented as evidence of an essential element of the crime—drug type and weight—presentation of this evidence effectively "rewards the state with a prima facie presumption that the prosecution has proven the truth of the report." *Id.* at 490. In effect, the prosecutor becomes the "referee"

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(N.M. 2004) (holding blood alcohol report not testimonial and within public records exception because it was prepared by public health agency, rather than law enforcement, and therefore was neither investigative nor prosecutorial).

in a game that he has an interest in winning, and thus has every incentive to use "shortcut[s] to the process of proof." Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford *v.* Washington, 15 J.L. & Pol'y 791, 800 (2007).

But by removing the defendant's opportunity to confront, before the fact-finder, the presentation of forensic evidence to prove an essential element of the crime, the certification system robs the adversarial system of many of the incentives that promote the truth-finding function of a criminal trial. The declarant of an out-of-court statement in support of the prosecution does not have the same incentives that are present under the traditional construction of the confrontation guarantee to cautiously and conscientiously create and preserve evidence from the outset in order to avoid the possibility of later impeachment. Rather, with statements submitted in writing, information can easily be spun, misrepresented, omitted or fabricated precisely because no follow-up questioning is afforded. As one commentator aptly observed, "[p]ractically speaking, these statutes mean that the fact that a substance found on the defendant's person was tested and determined to be cocaine of a specified quantity might, at the prosecutor's prerogative, be proven by waving an official-looking paper that says so before the jury." Mnookin, 15 J.L. & Pol'y at 798.

*Amici* believe that use of the certification system impermissibly bypasses the confrontation right in a manner that is wholly inconsistent with our adversarial system. See *Barefoot* v. *Estelle*, 463 U.S. 880, 899 (1983) (our "adversary system" is designed to permit the factfinder to "uncover, recognize and take due account" of the "shortcomings" of expert

evidence), *superseded by statute*, Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2253, *as recognized in Slack* v. *McDaniel*, 529 U.S. 473 (2000); see also *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) (endorsing "[v]igorous cross-examination" as a means of attacking scientific evidence). *Amici* urge the Court to grant review in this case and to declare that the traditional method of fulfilling the confrontation guarantee is the only constitutionally acceptable method.

This issue goes well beyond the unconfronted admission of state forensic examiner reports. It is the nature of our adversarial system that the prosecution will constantly push to limit its confrontation obligations. Thus, the recognition by a number of states of any rule for state forensic examiners more lenient than one requiring the prosecution to present live testimony subject to cross-examination by the defense creates a dangerous slippery slope. If it is permissible to bypass the Confrontation Clause by labeling forensic evidence certifications non-testimonial, then it would presumably no more offend the Constitution to allow the prosecution to prove its entire case by affidavit, no matter the precise type of out-of-court statement at issue. See *People* v. *McClanahan*, 729 N.E. 2d 470, 477 (Ill. 2000) (acknowledging this danger); see also, *e.g.*, *Starr* v. *State*, 604 S.E.2d 297, 299 (Ga. Ct. App. 2004) (permitting introduction of alleged victim's videotaped statement in lieu of live testimony where defense could have called her as a witness). In other words, the certification rule threatens not only to undo the importance of the *Crawford* and *Davis* decisions, which reaffirmed importance of live testimony, in court, subject to cross-examination, but also to "dramatic[ally] change . . . the way we conduct

criminal trials." Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L. J. 1011, 1038 (1998). With such basic principles at stake, the Court's corrective intervention is urgently needed.

## II. WHETHER STATE FORENSIC EXAMINER EVIDENCE IS TESTIMONIAL AND SUBJECT TO TRADITIONAL CONFRONTATION GUARANTEES IMPLICATES THE INTEGRITY OF OUR CRIMINAL JUSTICE SYSTEM.

We need only look back to recent history for proof that the integrity of our criminal justice system is at stake. During the *Roberts* era, a defendant's right to confrontation and cross-examination of a prosecution witness was downgraded from a categorical constitutional guarantee to a highly arbitrary judicial determination of evidentiary reliability. At the same time, some states (erroneously) concluded that the mechanism for fulfilling the confrontation obligation, in the more limited instances that obligation was recognized under *Roberts*, could be altered in such a way as to further constrict the scope of the right. In particular, some states endorsed the use of purportedly reliable forensic examiner reports in lieu of live testimony so long as a defendant had an opportunity to subpoena the examiner to testify. From the vantage of hindsight, the result was predictable: the *Roberts* era coincided with widespread crime laboratory failures around the country.

Lest history repeat itself, this Court should use Petitioner's case as a vehicle to expressly reject the permissive admission of unconfronted forensic evidence and affirm that the traditional strictures of the confrontation right regulate the admission of such

evidence. The Court's constitutional holding in *Crawford* means little in practice if States can avoid that holding by simply categorizing vital prosecution evidence used to prove elements as "non-testimonial." Now that the *Roberts* regime has been rejected, reliance on a forensic certification in lieu of live testimony will be the most attractive option for bypassing the rigors of its traditional confrontation obligations. Moreover, state legislatures have the incentives of increased conviction rates and decreased costs to create systems like the one used in Massachusetts, that employ certification as proof of prima facie evidence of an element of a crime.

The ability to confront and probe scientific evidence is critical because it is often the most powerful evidence in the prosecution's arsenal, and is considered to be extremely reliable and persuasive by juries. In a survey of potential jurors in the District of Columbia, respondents said that, on a scale of one to ten, fingerprint and DNA evidence rated 8.3 and 9 respectively for general persuasiveness, and 8.6 and 9 for general reliability; likewise 94% of those polled deemed "important" laboratory and scientific tests performed by the government that provided favorable evidence to the defense, and 91% of those polled said that they would be concerned if the prosecution withheld this information from the defense. See Survey of D.C. Jurors conducted by the Public Defender Service in December 2003, questions 3, 6, 17, 20, 57, & 71.[6]

This reliance is potentially dangerous because this sort of evidence is no more immune to human error or

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[6] *Available at* http://www.pdsdc.org/Special Litigation/SLD SystemResources/Brady%20Poll%20Results,%20December%202003.pdf.

bias than any other type of evidence. Thus, in the review of the first 74 DNA exoneration cases analyzed by the Innocence Project, *one third* involved "tainted or fraudulent science." Barry Scheck et al., *Actual Innocence: When Justice Goes Wrong and How to Make It Right*, 365 (2003); see also Maurice Possley, *Crime Lab Disorganized, Report Says Consultant Alleges Meager Supervision, Inadequate Training*, CHI. TRIB., Jan. 15, 2001, at 1 (examination of first 200 exoneration cases since 1986 revealed than "more than a quarter involved faulty crime lab work or testimony"). Indeed, our *Roberts*-era history suggests that forensic evidence, just like any other type of evidence, is more susceptible to human error and misrepresentation when it is shielded from confrontation.

During the *Roberts* era, the confrontation guarantee turned on judicial estimations of evidentiary reliability and in-court confrontation was generally devalued. See *Roberts*, 448 U.S. 56. At the same time, the practice of allowing the prosecution to introduce a state forensic examiner's report against the accused as a substitute for the forensic examiner's live testimony gained currency and proliferated rapidly. Conclusory declarations about the results of a "wide range" of forensic tests—including drug tests, "DNA tests, microscopic hair analyses, fingerprint identifications, coroners' reports, [and] ballistics tests," were exempted from the strictures of the Confrontation Clause. Metzger, 59 Vand. L. Rev. at 479; *id.* at 479 n.12. Demonstrating the influence of *Roberts*, the oft-cited justification for the permissive use of these unconfronted forensic laboratory reports was their inherent reliability. *Id.* at 480 n.15.

Ironically, the *Roberts*-era attitude that confrontation was discretionary and dispensable for "reliable" evidence can only have created an atmosphere which facilitated the creation and admission of unreliable evidence at trial precisely because the work of state forensic examiners was largely insulated from meaningful scrutiny. It would be an overstatement to say that confrontation is the cure-all for faulty forensic evidence; there will always be some people who are willing to take the stand and affirmatively lie or withhold information that might expose their testimony to be falsely premised or unreliable. But in-court confrontation works in concrete ways to deter the creation and use in court of sloppy, inaccurate, or falsified forensic work. See Point I *supra*; see also *Crawford*, 541 U.S. at 61 (confrontation identified as the procedural mechanism through which "reliability *can best be* determined") (emphasis added).

And, in fact, the practice of insulating the work of state forensic examiners from the crucible of adversarial testing coincided with a disconcerting number of systemic laboratory errors and failures around the country. Flaws with the administration and operation of state forensic laboratories and the evidence they generated during this time have been uncovered in virtually every state or locality in the country, as well as in the federal system, and are well-documented in Baltimore, Boston, Chicago, Cleveland, Los Angeles, Montana, Oklahoma City, Texas (Houston, Fort Worth, and West Texas), Virginia, Washington, and West Virginia. See generally Appendix of Sample Crime Laboratory Failures from Around the Country During the *Roberts* Era ("App. of Crime Lab Failures"). In these jurisdictions, the same types of human error that can

undermine the reliability of any other type of evidence—overwork, inattention, bias, lack of training, outright dishonesty—compromised the reliability and probity of laboratory tests and the reports of those test results. *Id.*

A guarantee of routine in-court confrontation might have averted problems like these. Confrontation might have prompted the crime laboratories in these jurisdictions to act with greater care from the outset. Part of the problem is that many of the lab failures documented above would not be discernable from state forensic examiner reports used by the prosecution. As noted above, and as was the case below, see Point I *supra*, these reports often incorporate only the examiner's bar conclusions without providing any information about the tests performed, the manner in which tests were conducted, laboratory protocols, departure from these protocols and the reasons therefore, or error rates. Thus the act of writing the report does not require self-scrutiny by the examiner, and hence provides little incentive either to conduct tests properly and carefully or to report results accurately. The expectation of in-court confrontation provides these incentives, however, and thus can reduce the susceptibility of this evidence to error.

If it did not preempt them, a guarantee of routine confrontation could have also prompted or hastened the in-court exposure of these systemic problems. The types of errors and problems that have been discovered—disregard for protocols in conducting lab tests, lack of meaningful protocols, falsification of credentials by forensic examiners, fabrication of test results, utilization of junk science techniques or other flawed forensic methodology, pro-government bias, misreporting of actual test results, see App. of Crime

Lab Failures—are the very types of mistakes and misconduct that the crucible of adversarial testing is generally designed to deter and reveal. A forensic examiner may think twice about making unsupported, inaccurate or false statements when testifying in open court. In addition, defense counsel has the opportunity with the examiner on the stand to contrast inadequate protocols and methodologies with best practices, expose error rates and bias, question training, and reveal all the inconsistencies and implausibilities inherent in testimony that lacks adequate foundation or contains actual falsehoods. See, *e.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 447 (1995) (through cross-examination defense counsel could have "laid the foundation for a vigorous argument that the police had been guilty of negligence");[7] *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678-79 (1986) (right to confrontation encompasses right to cross-examine prosecution witnesses for bias); *United States* v. *Davis*, 14 M.J. 847, 848 n.3 (A.C.M.R. 1982) (cross-examination of a "chemist may reveal the possibility of laboratory error due to the carelessness").

Without in-court confrontation, there is little assurance that defense counsel will be able to probe any of these matters effectively, if at all. Indeed, it is

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[7] The prosecution is obliged to turn over Brady information to defense counsel for this precise purpose. *Kyles*, 514 U.S. at 446 n.15 (When "the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it."); *Smith* v. *Secretary of New Mexico Dep't of Corr.*, 50 F.3d 801, 830 (10th Cir. 1995) (*Brady* obligation encompasses information "would also have been useful in discredit[ing] the caliber of the investigation") (internal citation and quotation omitted) (alteration in original).

telling that, although the crime laboratory errors and problems documented above occurred almost exclusively in criminal prosecutions, they were uncovered largely outside of the criminal trial process. Often long after the fact, the unreliability of laboratory test results and reports relied on in criminal trials was brought to light by media exposés, civil suits and post-conviction proceedings that afforded meaningful discovery, whistleblowers, and innocence commissions examining the causes of wrongful convictions. See App. of Crime Lab Failures.

Even in the smaller subset of cases under *Roberts* where it was deemed necessary, in-court confrontation revealed laboratory errors and problems, thus demonstrating the very efficacy of adversarial testing to "beat[ ] and bolt[ ] out the Truth." *Crawford*, 541 U.S. at 62 (internal citation and quotation omitted). The cross-examination of a police chemist about her testing of blood evidence in a Baltimore County, Maryland case is illustrative. The chemist acknowledged that "she did not understand the science behind many of the tests that she performed," and "she did not perform a number of standard tests on the blood samples in the case." Stephanie Hanes, *Chemist Quit Crime Lab Job After Hearing, Papers Show; She Acknowledged Report Was 'Worthless' In 1987,* BALT. SUN, Mar. 19, 2003, at B1. She also "agreed that other tests she had completed were useless" and "acknowledged that she had failed to record the results of some testing steps needed to ensure accuracy in blood typing." *Id.* Finally, she acknowledged at the conclusion of cross that, "as a result of all this" "there [wa]s not one finding, one result in this report that [wa]s usable" and that her "entire report . . . [her] entire analysis

[wa]s absolutely worthless." *Id.*[8] Cross-examination had similarly beneficial results in *Ragland* v. *Kentucky*, 191 S.W.3d 569, 581 (Ky. 2006), where an FBI bullet lead composition analyst was caught in a lie by defense counsel on cross-examination, confronted with her earlier statements, and eventually forced to admit that her prior statements were false. Later, the analyst admitted, "[i]t was *only after the cross-examination at trial* that I knew I had to address the consequences of my actions." *Id.* (emphasis added).

The errors and failures of forensic evidence detailed above expose the bankruptcy of the argument that confrontation is unnecessary in the area of forensic science because of its inherent reliability. They also demonstrate how concerns about the "cost" of presenting live-witness testimony by forensic examiners are, at best, penny-wise and pound-foolish. Time away from the laboratory and transportation to the courthouse are not the only costs implicated. There are also real costs to a suspension of confrontation: wrongful convictions, attendant civil suits, loss of public trust, and, in some cases, the failure to apprehend the true perpetrator. See *In Re Investigation of West Virginia State Police Crime Lab., Serology Div.*, 438 S.E.2d 501, 508 (W.Va. 1993) (systemic forensic failures "stain our judicial system and mock the ideal of justice under [the] law"). The recent and extensive history of laboratory errors and failures demonstrates why it is critical for this Court

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[8] This chemist also tested blood evidence in DNA-exoneree Bernard Webster's case, but the prosecutor opted not to call her as a witness because he "didn't want to complicate" the case by allowing the defense to conduct what he anticipated would have been "a nasty cross-examination." Hanes, *Chemist Quit Crime Lab, supra.*

to determine post-*Crawford*, whether state forensic examiner evidence is testimonial and thus subject to the traditional strictures of the confrontation clause, a question this Court should expressly answer in the affirmative.

## CONCLUSION

For all the reasons set forth above, the Petition should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX OF SAMPLE CRIME LABORATORY FAILURES FROM AROUND THE COUNTRY DURING THE *ROBERTS* ERA

**Baltimore, Maryland**: In Baltimore County, a county-employed forensic chemist resigned after acknowledging at a preliminary hearing in a murder case that she did not understand the science involved in her serology work, that she failed to perform standard tests in the case, and that she had failed to properly record her test results. See Stephanie Hanes, *Chemist Quit Crime Lab Job After Hearing, Papers Show; She Acknowledged Report Was 'Worthless' In 1987*, BALT. SUN, March 19, 2003, at B1. Police acknowledged an independent audit of her work was warranted after her testimony in the case of Bernard Webster came to light and was characterized as "within the definition of material perjury." *Id.* Webster spent twenty years in prison for rape before being exonerated by DNA evidence. *Id.*

**Boston, Massachusetts**: The reexamination of a previously identified fingerprint revealed that Stephan Cowans was wrongfully convicted of shooting a police officer and was imprisoned for six and a half years based on faulty fingerprint analysis. Police Commissioner blamed the error on "low standards and a lack of professionalism." Ralph Ranalli, *Reilly Won't Charge Two Police Analysts*, BOSTON GLOBE, June 25, 2004, at B8. The botched match "wasn't even close" and was described as "no simple mistake." *Id.* Shortly

after the error was discovered, the Massachusetts's State Police (one of only sixteen state agencies nationwide that at the time remained uncertified) took over Boston's fingerprinting lab in an effort to upgrade the quality of work. Suzanne Smalley, *State Police to Process Boston Prints Scathing Review Prompts Shift*, BOSTON GLOBE, Oct. 16, 2004, at B3. Mr. Cowans reached a $3.2 million settlement with the city and received another $500,000 for his wrongful imprisonment. David Abel, *Man Wrongfully Convicted in Boston Police Shooting Found Dead*, BOSTON GLOBE, Oct. 26, 2007.

**Chicago, Illinois**: Prompted by DNA exonerations, journalists have now uncovered many instances in which forensic examiners in the Illinois State Police crime laboratory in Chicago stretched lab reports so as to inculpate defendants who turned out to be innocent, in part because analysts in Illinois are funded by police agencies and state law mandates they serve the prosecution. See Steven Mills, et. al., *When Labs Falter, Defendants Pay*, CHI. TRIB., Oct. 20, 2004, at 1. An independent review in connection with a civil case has uncovered many additional problems with the Chicago Police crime laboratory, including poor supervision, lack of protocols and inadequately trained staff. Maurice Possley, *Crime Lab Disorganized, Report Says Consultant Alleges Meager Supervision, Inadequate Training*, CHI. TRIB., Jan. 15, 2001, at 1.

**Cleveland, Ohio**: In Cleveland, a state forensic examiner vastly overstated the importance of

largely irrelevant serological test results, resulting in the wrongful conviction of Michael Green. The city agreed to settle Green's civil case for $1.6 million and a commitment to look into the 100 cases that included the same forensic laboratory worker who testified falsely at Green's rape trial. See Connie Schultz, *City to Pay $1.6 Million for Man's Prison Time*, PLAIN DEALER, June 8, 2004, at A1.

**Fort Worth, Texas**: The Fort Worth Police Department's crime laboratory was forced to review almost 100 cases—three years' worth of DNA evidence—when a proficiency test revealed a senior forensic examiner did not follow proper procedures and protocols. Deanna Boyd, *Crime Lab Subject of Criminal Inquiry*, FT. WORTH STAR-TELEGRAM, April 13, 2003 at 1. The laboratory's work had been questioned but remained unaddressed for three years, despite additional issues of case backlogs, staff shortages and an "inadequate facility." *Id.*

**Houston, Texas:** The Houston Police Department Crime Laboratory was exposed in a series of investigative news reports that aired on KHOU–Channel 11, a local Houston television station. The story led to an audit, which revealed a dysfunctional organization with serious contamination issues and an untrained staff using shoddy science, including poor calibration and maintenance of equipment, improper record keeping, a lack of safeguards against contamination, and a leaky roof which flooded boxes of biological evidence. *Quality Assurance Audit of Houston Police Dep't Crime Laboratory – DNA/Serology Section* (Dec. 12- 13,

2002), http://www.pdsdc.org/resources/dna/QA_Audit_for_DNA_databasing_labs.pdf. Five reports were issued by the Independent Investigator of the Houston Police Department and Property Room between May 31, 2005 and May 11, 2006 documenting extensive problems in nearly every division of the laboratory. See, *e.g.*, *Third Report of the Independent Investigator for the Houston Police Dep't Crime Laboratory and Property Room* 1 (June 30, 2005), http://www.hpdlabinvestigation.org/reports/050630report.pdf; *Fifth Report of the Independent Investigator for the Houston Police Dep't Crime Laboratory and Property Room*, 66-67 (May 11, 2006), http://www.hpdlabinvestigation.org/reports/060511report.pdf.

**Western Texas**: A contract medical examiner, Dr. Ralph Erdmann, who worked in more than 40 rural counties in Texas beginning in the early 1980s, and may have performed up to 400 autopsies a year, was convicted of seven felony counts (spanning three counties) of falsifying autopsies. Roberto Suro, *Ripples of a Pathologist's Misconduct in Graves and Courts of West Texas*, N.Y. TIMES, Nov. 22, 1992 at 22. Suspicion arose about Erdmann when he listed in an autopsy report the weight of a decedent's spleen—where relatives were aware the decedent's spleen had been removed years prior to his death. *Id.* A special prosecutor appointed to investigate the misconduct said even a narrow examination of Erdmann's conduct reveled around 100 faked autopsies in a single county. *Id.* The special prosecutor noted, "[i]f the prosecution theory was that the death was caused by a Martian death ray, then that was

what Dr. Erdmann reported." Richard L. Fricker, *Pathologist's Plea Adds to Turmoil: Discover of Possibly Hundreds of Faked Autopsies Helps Defense Challenges*, 79 A.B.A.J. 24 (March 1993). In spite of this bias, Erdmann on several occasions determined individuals had died of natural causes when in fact they had been killed. See, *e.g.*, Geoffrey A. Campbell, *Erdmann Faces New Legal Woes: Pathologist Indicted for Perjury in Texas Murder Trial*, 81 A.B.A.J. 32 (November 1995); *Couple Indicted on Murder Charges*, DALLAS MORNING NEWS, March 24, 1993, at 14D. In addition, he also exaggerated his credentials, claiming to be a ballistics expert. Suro, *Ripples*, N.Y. TIMES, Nov. 22, 1992 at 22.

**Los Angeles, California**: In Los Angeles, a police chemist failed to follow basic protocols for drug tests: he did not weigh drugs separately from the containers in which they were seized. See Anna Gorman, *LAPD Narcotics Analyst Erred: Botched Evidence Raises Question on Credibility. Public Defender's Office Demands an Accounting*, L.A. TIMES, Sept. 2, 2004, at B1. After the error was ultimately discovered in one case, a preliminary review of the analyst's prior work was conducted and revealed problems in 47 additional cases, and subsequently lead to a review of all 972 drug cases in which he was involved. *Id.* The chemist had started at the crime lab analyzing blood and urine evidence before moving to narcotics. *Id.*

**Mississippi**: A forensic dentist represented that he could "match" bite marks, tool marks, shoe prints, fingernail imprints, and knife wounds using a method he dubbed, after himself, the

"West Phenomenon." Marcia Coyle, *"Expert" Science under Fire in Capital Cases; Daubert vs. Frye*, Nat. L.J., July 11, 1994, at A1. The "West Phenomenon" involved using an alternate light source to analyze the wounds; his methodology could neither be reproduced nor photographed. *Id.* The forensic dentist's misconduct was acknowledged two years after a defense attorney complained to the American Academy of Forensic Sciences, which found West misrepresented data to bolster the acceptance of his technique and that his testimony was misleading in its certainty as well as its methodology. *Id.* Other review boards thereafter criticized his testimony and his methodology. *Id.*

**Montana**: An exoneration revealed the faulty and invented statistical analysis for hair evidence by the founder and director of the Montana state police crime laboratory had resulted in at least two additional wrongful convictions. An independent review board reviewed the examiner's testimony and concluded he had demonstrated a "fundamental lack of understanding" of hair comparisons. See Innocence Project, Peer Review Report: *Montana* v. *Jimmy Ray Bromgard*, http://www.innocence

project.org/docs/bromgard_print_version1.html; Adam Liptak, *States to Review Lab Work of Expert Who Erred On ID*, N.Y. TIMES, Dec. 19, 2002, at A24. After his shoddy work was exposed in Montana, the Montana crime laboratory director moved to Washington to conduct drug analysis work. Ruth Teichroeb, *Counties to Be Told of Crime Lab Flaws*, SEATTLE POST-INTELLIGENCER, March 17, 2004, *available at*

http://seattlepi.nwsource.com/local/165129_crimelab17.html. When his past became known, an internal review of his drug analysis work revealed additional methodology problems. The reviewer described the forensic work as "sloppy" and "built around speed and shortcuts." *Id.*

**Oklahoma City, Oklahoma**: In Oklahoma, in multiple criminal cases over the course of a decade, a forensic chemist failed to follow basic scientific method, misrepresented qualifications, contaminated evidence, misreported test results, withheld evidence from the defense, and drew conclusions beyond bounds of accepted science. See *McCarty* v. *State*, 765 P.2d 1215, 1218-19 (Ok. Ct. Crim. App. 1988); *McCarty* v. *State*, 114 P.3d 1089, 1093 n.19 (Ok. Ct. Crim. App. 2005); See also, Special Agent Douglas Deedrick, *Summary of Case Reviews Of Forensic Chemist, Oklahoma City Police Department Crime Laboratory* (April 4, 2001), http://www.pdsdc.org/resources/dna/Summary_of_case_reviews_for_Joyce_Gilchrist.pdf

**Virginia**: After an exoneration in Virginia, the governor directed the state laboratory to allow an audit by the American Society of Crime Laboratory Directors ("ASCLD"). The audit found that crime laboratory examiners interpreted DNA tests erroneously, deviated from standard protocols, and were subject to pressure to reach results consistent with the prosecution case, rather than conducting neutral scientific analysis. See *American Society of Crime Laboratory Directors, Limited Scope of Interim Inspection Report of the Virginia Division of Forensic Science Central Laboratory*

(Apr. 9, 2005), http://www.innocenceproject.org/docs/VA_ASCLD_Audit_Report.pdf; Steve Mills, *Top Lab Repeatedly Botched DNA Tests*, CHI. TRIB., May 8, 2005, at 8 (describing American Society of Crime Laboratory Directors Report).

**Washington**: A review by journalists of various Washington state crime laboratories found multiple instances of contamination, sloppy reporting techniques, the use of "junk science," bias in favor of law enforcement, influence of law enforcement over laboratory workers, and concealment of botched tests at various Washington state patrol laboratories. See Ruth Teichroeb, *Rare Look Inside State Crime Labs Reveals Recurring DNA Test Problems*, SEATTLE POST-INTELLIGENCER, July 22, 2004, *available at* http://seattlepi.nwsource.com/local/183007_crimelab22.html; Ruth Teichroeb, *Oversight of Crime-Lab Staff Has Often Been Lax*, SEATTLE POST-INTELLIGENCER, July 23, 2004, *available at* http://seattlepi.nwsource.com/local/183203_crimelab23.html; Ruth Teichroeb, *Crime Labs Too Beholden to Prosecutors, Critics Say*, SEATTLE POST-INTELLIGENCER, July 23, 2004, *available at* http://seattlepi.nwsource.com/local/183227_lab solutions23.html.

**West Virginia**: After the DNA exoneration of Glen Dale Woodall, and the insurance investigation which resulted in a settlement of $1 million in Woodall's civil suit for false imprisonment, the Prosecuting Attorney for Kanawha County requested a judicial investigation into the work of the serology department at the West Virginia Department of Public Safety; a separate investigation was

conducted by the ASCLD. See *In Re Investigation of West Virginia State Police Crime Lab., Serology Div.*, 438 S.E.2d 501, 503 (W.Va. 1993). The judge found misconduct on a massive scale: the serologist, Fred Zain, routinely overstated results, provided misleading statements about his results, failed to perform tests he claimed to have performed, failed to report exculpatory results, failed to follow-up on conflicting results, reported scientifically impossible or improbable results, and altered laboratory reports. *Id.* at 503. And his misconduct always favored the prosecution: the ASCLD team found, "when in doubt, Zain's findings would always inculpate the suspect." *Id.* at 512 n. 9. Contributing to the misconduct was the fact that Zain's supervisors ignored or concealed complaints about his work. *Id.* at 503-4. The ASCLD also concluded that laboratory operating procedures—which, among other things, did not require written documentation of methodology, lacked auditing requirements, lacked written protocols, and failed to follow accepted scientific protocols—"undoubtedly contributed to an environment within which [the serologist's] misconduct escaped detection." *Id.* at 504. After citing "shocking and . . . egregious violations" and the "corruption of our legal system," the judicial inquiry concluded, "as a matter of law, any testimonial or documentary evidence offered by Zain at any time in any criminal prosecution should be deemed invalid, unreliable, and inadmissible." *Id.* at 506, 508, 520.

**Federal Bureau of Investigations Crime Laboratory:** Allegations of wrongdoing and

improper practices within the FBI by Supervisory Special Agent Frederic Whitehurst involving some of the most significant prosecutions of the 1990s prompted the Office of Inspector General to investigate the nation's most respected crime laboratory. See, *Office of Inspector General, U.S. Dep't of Justice, The FBI Laboratory: An Investigation Into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (April 1997), *available at* http://www. usdoj.gov/oig/special/9704a/index. htm ("1997 I.G. Report"). "FBI examiners had given scientifically flawed, inaccurate, and overstated testimony under oath in court; had altered the lab reports of examiners to give them a pro-prosecutorial slant, and had failed to document tests and examinations from which they drew incriminating conclusions, thus ensuring that their work could never be properly checked." John F. Kelly & Phillip K. Wearne, *Tainting Evidence* 2 (1998); See *also,* 1997 I.G. Report, Executive Summary, part I, section A. The FBI laboratory and analysts have been criticized in divisions ranging from fingerprint analysis (for example, the FBI misidentification of Brandon Mayfield, a Portland, Oregon, lawyer as a perpetrator of the Madrid terrorist attack of March 11, 2004, Flynn McRoberts & Maurice Possley, *Report Blasts FBI Lab: Peer Pressure Led to False ID of Madrid Fingerprint,* CHI. TRIB., Nov. 14, 2004, *available at* 2004 WLNR 19808891), to comparative analysis of bullet lead (William A. Tobin & Wayne Duerfeldt, *How Probative is Comparative Bullet Lead Analysis?*, 17 CRIM. JUSTICE 26 (Fall 2002) (retired FBI examiner began questioning the scientific

technique of bullet lead composition analysis)). A 2004 Report by the Office of Inspector General focused on Jacqueline Blake, who worked in the DNA unit for two years after having worked in the serology division for the ten previous years. *Office of Inspector General, U.S. Dep't of Justice, The FBI Laboratory: A Review of Protocol and Practice Vulnerabilities* (May 2004), *available at* http://www.usdoj.gov/oig/special/0405/final.pdf ("2004 I.G. Report"). In May 2004, she pleaded guilty to a misdemeanor charge of providing false information in her lab reports. Maurice Possley, *Scandal Touches Elite Labs*, CHI. TRIB., October 21, 2004 at 1. Significantly, although the FBI lab was accredited and subject to audits, it was not an audit that discovered Blake's malfeasance—rather, a colleague who was working late one night accidentally discovered Blake's inconsistent and improper documentation. 2004 I.G. Report, Executive Summary at ii.

**Federal Bureau of Investigation:** CBS's *60 Minutes* and *The Washington Post* recently uncovered hundreds of defendants convicted with the now discredited tool of bullet lead analysis. More startling, when the FBI discovered that this analysis was faulty, it never notified the defendants, their lawyers or the courts. Bullet lead analysis has been used for over forty years in thousands of cases. This analysis was often used when standard ballistics analysis was impossible due to deformed bullets. In 2002, the FBI asked the National Academy of Science to independently review this type of analysis. After the National Research Council report called into question this analysis, the FBI waited nearly a

year before stopping bullet lead analysis. It sent form letters which suggested that the method should no longer be employed, but did not state that prior testimony was invalid. Only after CBS and The Washington Post investigation did the FBI acknowledge its mistakes and agree to review all cases. See *Evidence of Injustice*, CBS NEWS (Nov. 18, 2007), http://www.cbsnews.com/stories/2007/11/16/60minutes/main3512453.shtml.

**Drug Enforcement Agency:** Veteran chemist Anne Castillo of the Dallas, Texas, Drug Enforcement Agency Laboratory, which analyzes evidence for state and federal agencies in Texas, Alabama, Arizona, Louisiana, Mississippi, New Mexico and Oklahoma, admitted in 1996 to fabricating results and providing testimony for tests never performed. Peter Schoenburg & Steve McCue, *Controlled Substances*, 20 CHAMPION 34 (Dec. 1996). While DEA director Howard Schlesinger confirmed Castillo had fabricated test results for at least several months – affecting hundreds of cases – he admitted there was no way to determine for how long she had been doing so, as she had been with the laboratory for many years, and worked on a full range of controlled substance cases. *Hundreds of Drug Cases May Be in Jeopardy*, DALLAS MORNING NEWS, July 19, 1996, at 34.

# AMICUS CURIAE BRIEF

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No. 07-591

In The

# Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,

*Petitioner,*

v.

MASSACHUSETTS,

*Respondent.*

**On Petition for a Writ of Certiorari to the Appeals Court of Massachusetts**

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF RICHARD D. FRIEDMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

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No. 07-591

IN THE
SUPREME COURT OF THE UNITED STATES

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LUIS E. MELENDEZ-DIAZ,

*PETITIONER*,

v.

MASSACHUSETTS,

*RESPONDENT*.

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# MOTION OF RICHARD D. FRIEDMAN FOR LEAVE TO FILE BRIEF, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 37.2(b), Richard D. Friedman respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the Petition for *certiorari*. *Amicus* has given the parties more than ten days' notice of his intention to file this brief. Petitioner has granted consent, but respondent has refused consent. A written statement of petitioner's consent has been filed with the clerk.

This case raises important questions concerning the scope of the Confrontation Clause of the Sixth Amendment to the Constitution, which is a central aspect of our criminal justice system.

I am a legal academic; I hold the title of Ralph

W. Aigler Professor of Law at the University of Michigan Law School. Since 1982 I have taught Evidence law. I am general editor of THE NEW WIGMORE: A TREATISE ON EVIDENCE, and author of THE ELEMENTS OF EVIDENCE (3d ed. 2004).

Much of my academic work has dealt with the right of an accused under the Sixth Amendment "to be confronted with the witnesses against him." I have written many articles and essays on that right, and since 2004 I have maintained The Confrontation Blog, www.confrontationright.blogspot.com, to report and comment on developments related to it.

In *Lilly v. Virginia*, 527 U.S. 116 (1999), I was one of the principal authors of the American Civil Liberties Union's *amicus* brief, which Justice Breyer discussed in his concurring opinion, 527 U.S. at 140-43, addressing the eventual need for re-evaluating the basis of Confrontation Clause doctrine. In *Crawford v. Washington*, 541 U.S. 36 (2004), I was author of a law professors' *amicus* brief, which was discussed in oral argument, and the Court's decision cited one of my essays. In 2005-06, I successfully represented the petitioner in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 126 S.Ct. 2266 (2006)). In *United States v. Yida*, 498 F.3d 945, 951, 959 (9th Cir. 2007), the court quoted approvingly from an *amicus* brief I had submitted on behalf of myself only. Last week, in *Giles v. California*, No. 07-6053, I filed another solo *amicus* brief (with the consent of the parties) in support of a petition for *certiorari*.

As in *Yida* and *Giles*, I am submitting this brief on behalf of myself only; I have not asked any other person or entity to join in it. I am doing this so that I

can express my own thoughts, entirely in my own voice. I am entirely neutral in this case, in the sense that my interest is not to promote an outcome good for one party or the other, or for prosecutors or defendants as a class. Rather, my interest, in accordance with my academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime.

Indeed, while in *Giles* my views on the merits are far more in line with those of the respondent state than with the accused, in this case they are far more in line with those of the accused. As in *Giles*, however, I support the petition for *certiorari*. I believe that my perspective allows me to be of assistance to the Court in demonstrating why the question presented by the petition in this case is perhaps the most pressing issue, both practically and theoretically, concerning the scope of the Confrontation Clause. Accordingly, I respectfully seek leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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**BRIEF OF RICHARD D. FRIEDMAN, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI**

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## INTEREST OF *AMICUS CURIAE*[1]

The interest of *amicus* is set forth in the accompanying motion for leave to file this brief *amicus curiae.*

## SUMMARY OF ARGUMENT

The question presented by the petition is whether a state forensic analyst's laboratory report, prepared for use in a criminal prosecution, is a "testimonial" statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004). The Appeals Court of Massachusetts, following binding precedent of the state's Supreme Judicial Court, effectively answered in the negative. *Amicus*, like petitioner, believes that such reports are clearly testimonial.

Amicus has little or nothing to add to the petition's able showing that the lower courts are in sharp and irreconcilable conflict on this question, and that this case is an excellent vehicle for considering it. The principal goal of this brief is to make clear how great are the consequences, both theoretical and practical, of

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[1] As noted in the accompanying motion, *amicus* has given the parties more than ten days' notice of his intention to file this brief. Petitioner has given consent, but respondent has not. A written statement of petitioner's consent has been filed with the clerk. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than the *amicus* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

this question.

The refusal of many courts to recognize the testimonial character of laboratory reports like the one in this case reflects a tendency that predates *Crawford*, to treat the Confrontation Clause as little more than an obstacle to efficient truth-determination. Laboratory reports prepared by government agents for the purpose of assisting prosecution can be deemed to be non-testimonial only by discarding the fundamental framework that *Crawford* established and effectively returning to the regime of *Ohio v. Roberts*, 448 U.S. 56 (1980).

Because laboratory evidence is an important, and growing, part of prosecution evidence, cases holding that laboratory reports prepared for use in prosecution are not testimonial signal more than a theoretical misunderstanding of *Crawford*. They also threaten a wholesale change in our system of criminal justice, to one in which the key witness against the accused testifies out of court, in writing, not necessarily under oath, and not in the presence of the accused or subject to examination by him.

## ARGUMENT

### I. Further Intervention by the Court on the Meaning of "Testimonial" is Needed, and Perhaps the Most Important and Pressing Question is the One Presented by this Case.

*Crawford v. Washington*, 541 U.S. 36 (2004), transformed the doctrine governing whether introduc-

tion of an out-of-court statement against an accused violates the Confrontation Clause. Under *Crawford*, the central question in making that determination is whether the statement is testimonial in nature. If it is, then for purposes of the Clause the declarant was acting as a witness in making the statement; if not, as the Court has subsequently made clear, the declarant is deemed *not* to have been acting as a witness, and the Clause does not apply to the statement. *Davis v. Washington*, 126 S.Ct. 2266, 2274-76 (2006); *Whorton v. Bockting*, 127 S.Ct. 1173, 1183 (2007).

*Crawford*, however, recognized that the Court would soon have to return to the field. The Court's opinion listed a few categories of statements that lay at the core of the category of testimonial statements. 541 U.S. at 52, 68. It also recited three definitions of "testimonial" that had been proposed, *id.* at 51-52. But, because the statement involved in the case would "qualify under any definition," *id.* at 52, the Court declined to adopt one. Quite the contrary, it said explicitly, "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" 541 U.S. at 68. Moreover, it acknowledged that its "refusal to articulate a comprehensive definition" in that case would "cause interim uncertainty." *Id.* at 68 n.10.

Two years later, in *Davis*, the Court did indeed return to the field. The *Davis* decision resolved a pair of cases involving fresh accusations of domestic violence made in response to interrogations by police agents. Once again, the Court made its decision "[w]ithout attempting to produce an exhaustive classification of all conceivable statements." 126 S.Ct. at 2273. Indeed, the Court declined even to produce an

exhaustive definition of "all conceivable statements in response to police interrogation." *Id.*

Thus, the Court has taken measured steps towards building an understanding of the term "testimonial" and so creating bounds on the Confrontation Clause. This is a prudent course, especially given how new the *Crawford* doctrine is and how dramatically different it is from what preceded it. But a corollary of this approach is that, to achieve ultimate success in building a sound doctrinal framework, the Court will need to decide more cases presenting questions whether given types of statements should be deemed testimonial.

*Amicus* believes that perhaps the most important and pressing remaining issue for the Court to resolve with respect to the meaning of the term "testimonial" is the one presented by this case – whether the term encompasses statements, such as laboratory reports, routinely produced by government agents as part of the investigatory and prosecutorial process. This is not an important and pressing issue because it is difficult. *On the contrary, amicus* believes the issue is clear-cut – these statements are obviously testimonial in nature – and, as discussed in Section II, this means that the doctrine of the Confrontation Clause will be seriously weakened if decisions holding otherwise are allowed to stand. Indeed, the fact, demonstrated by the petition, that numerous courts have treated these statements as non-testimonial shows that many courts have not yet come to grips with the transformation wrought by *Crawford*. Moreover, as discussed in Section III, cases presenting this issue are extremely common, and they will become more common until the matter is resolved.

## II. Because Statements of the Type Involved in this Case are So Clearly Testimonial, Allowing Decisions Like the One Below to Stand Will Weaken the Confrontation Clause.

Like the statement in *Crawford*, a forensic laboratory report prepared for use in a criminal case "qualif[ies] under any definition" of "testimonial."

Such a report is clearly prepared in anticipation of use in the prosecutorial process; in the view of *amicus*, this consideration should control the determination (as it does under the first and third definitions recited in *Crawford*).[2] There can be no plausible contention that under *Davis*, 126 S.Ct. at 2273-74, it was prepared to respond to an "ongoing emergency."

Another factor sometimes deemed essential to a statement being deemed testimonial, and crucial to the second definition offered in Crawford, is formality. *Amicus* believes that, if there is a formality requirement for a statement to be deemed testimonial, "it adds nothing to the requirement that the statement be made in anticipation of prosecutorial use," Richard D. Friedman, Crawford, Davis, *and Way Beyond*, 15 J. L. & Pol. 553, 569 (2007). But however stringent an independent formality requirement may be, the statement in this case – a forensic laboratory report

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[2] (1) The report is a pretrial statement similar to an affidavit "that declarants would reasonably expect to be used prosecutorially." (3) The statement was made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 541 U.S. at 51-52.

certified under oath – certainly satisfies it.[3]

Similarly, some courts believe – mistakenly, in the view of *amicus* – that a statement cannot be testimonial unless a government agent was involved in its creation. *E.g., People v. Vigil*, 127 P.2d 916 (Col. 2006). But of course that is not an issue here, because a government official was the *author* of the report. And for the same reason, a theoretical issue that arises in the context of police interrogations – whether the testimonial quality of the statement should be judged from the perspective of the declarant or from that of the interrogator, *e.g., Way Beyond, supra*, at 559-63 – does not arise here.

How, then, can courts hold forensic laboratory reports to be non-testimonial? Some courts, including the Massachusetts Supreme Judicial Court, have drawn on the reference in *Crawford* to the fact at the time of the adoption of the Sixth Amendment there were already several exceptions, including one for business records, that "by their nature were not testimonial." 541 U.S. at 55.[4] Obviously, this reference to the limited "shop book" rule extant as of 1791, *see* 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 429-30 (J.H. Chadbourn rev. 1974), does not allow a state to [illegible] a much broader hearsay exception

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[3] Compare *Hammon v. Indiana*, No. 05-5705, decided together with *Davis*, in which the Court said, "It was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his 'investigat[ion].'" 126 S.Ct. at 2278.

[4] *See* Commonwealth v. Verde, 827 N.E.2d 701, 703 (Mass. 2005) ("a drug certificate is akin to a business record and the confrontation clause is not implicated by this type of evidence").

as the means of effectuating a routine violation of the Constitution. A state may expand its hearsay exceptions for business and public records as far as it likes, but that will not alter the constitutional status of such records. If a type of document is routinely prepared for litigation it is testimonial in nature whether or not the state chooses to label it a business record. *Cf. Palmer v. Hoffman*, 318 U.S. 109, 114 (1943) (refusing to apply hearsay exception to reports for which the "primary utility is in litigating, not in railroading").

Nor does the fact that the author of the report is presumably recording her contemporaneous observations take the report out of the Confrontation Clause. *Cf. People v. Geier*, 161 P.3d 104, 139 (Cal. 2007) (report "constitute[s] a contemporaneous recordation of observable events rather than the documentation of past events."). There is no principle that a statement that would otherwise be testimonial is removed from the scope of the Clause because it is reporting on a contemporaneous condition or event. If that were the law, there would be no need for live testimony describing a crime scene; the report of a police officer (or of anyone else) could be introduced instead.

What the matter comes down to, then, is that some courts regard laboratory reports as so reliable that confrontation of the author is dispensable. These courts believe that the Confrontation Clause should not apply because laboratory reports are so trustworthy and the cost of making the authors confront the accused so great.[5] *Amicus* believes that these courts

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[5] *See, e.g.*, People v. Geier, 161 P.3d 104, 135 (Cal. 2007) ("Some courts . . . cite the practical difficulties that would ensue were *Crawford* applied to this type of evidence."); Commonwealth v.

are wrong on both matters of fact.[6] But of course the more significant point is that these considerations are inapposite under *Crawford*. Courts generally know to avoid the language of reliability, the keynote of the rejected regime of *Ohio v. Roberts*, 448 U.S. 56 (1980). But however they phrase the point, the substance is the same, and it runs directly contrary to the essence of *Crawford*.

This, unfortunately, is another chapter in an old

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Verde, 827 N.E.2d 701, 705 (Mass. 2005) (holding that certificates of chemical analysis are not testimonial because they are "neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test"); State v. Forte, 629 S.E.2d 137, 143 (N.C. 2006) (reports contain the agent's "[o]bjective analysis of the evidence, along with routine chain of custody information" and "are neutral"; the agent "has no interest in the outcome of any trial in which the records might be used"); State v. Lackey, 120 P.3d 332, 351 (Kan.2005) (characterizing autopsy reports as generally making "routine and descriptive observations of the physical body in an environment where the medical examiner would have little incentive to fabricate the results," and declaring that courts have declined to treat them as testimonial because to do so "would have the effect of requiring the pathologist who performed the autopsy to testify in every criminal proceeding").

[6] The vulnerabilities of lab reports are well established, Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 491-500 (2006), and those vulnerabilities are obviously greater if the reports are not exposed to adversarial testing.

A state concerned about cost could allow the author of a report to testify subject to confrontation quite efficiently, before trial, by videotaped deposition. The courts should then be rather generous in treating the author as unavailable to testify at trial, by virtue of distance or lack of memory or both. Given that the witness had testified subject to an opportunity for cross-examination, the Confrontation Clause would then pose no obstacle to admission of the report or of the deposition testimony.

story. The confrontation right plays a crucial role in maintaining a system of criminal justice that is fair and that, over the long term, is successful in determination of the truth. But in the short term its most salient impact is sometimes either to deprive the process of evidence that is highly probative or to increase the cost of the process by requiring the attendance of witnesses. A court focused primarily on the short-term impact of invoking the right is therefore strongly tempted to construe the right narrowly.

This was true during the *Roberts* era, as demonstrated by two remarkable catalogues included in the *Crawford* opinion. One was of cases that "attach[ed] the same significance to opposite facts" – but always in support of the conclusion that admission of the statement was constitutional. The second was of cases that, while purporting to apply *Roberts*, "admit[ted] core testimonial statements that the Confrontation Clause plainly meant to exclude." 541 U.S. at 63.

The same tendency persisted after *Crawford* discarded the *Roberts* doctrine. It was revealed first in the context of fresh accusations. Some courts disregarded *Crawford* so far as to conclude that if a statement fit within the "excited utterance" exception to the hearsay rule it could not be testimonial. *See, e.g., United States v. Brun*, 416 F.3d 703, 707-08 (8th Cir. 2005) (holding that statements made to responding officer were "excited utterances, and therefore nontestimonial statements"); *accord, e.g., State v. Banks*, 2004 WL 2809070 (Ohio App. 10th Dist. 2004) ("The holding in *Crawford* only applies to statements ... that are not subject to common-law exceptions to the hearsay rule, such as excited utterance or present

sense impression."). Other courts applied a variety of specious theories to avoid the clear command of *Crawford*, such as a rigid formality requirement,[7] or a rule that a statement could not be testimonial if it was initiated by the witness herself.[8] Intervention by this Court was necessary, and resulted in reversal of the state supreme court's decision in *Hammon v. Indiana*, No. 05-5705, which the Court accurately described as being close on its facts to *Crawford* itself. *Davis*, 126 S.Ct. at 2278 (noting that determination of whether statements at issue were testimonial "is a much easier task" in *Hammon* than in companion case, because "they were not much different from the statements we found to be testimonial in *Crawford*.).

The pattern persists. As the petition demonstrates, at 10-12, Massachusetts is far from alone in holding that forensic laboratory reports prepared for use in criminal prosecution are not testimonial. Many courts still appear to regard *Crawford* as an obstacle that can be avoided by new forms of words rather than as a fundamental reassertion of one of the central protections of our criminal justice system. Intervention by this Court is necessary not only to set these courts straight but also to ensure that the transformation wrought by *Crawford* is not seriously undermined.

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[7] *E.g.*, Hammon v. State, 809 N.E.2d 945 (Ind. 2004), *aff'd in relevant part on other grounds*, 829 N.E.2d 844 (Ind. 2005), *reversed sub nom.* Davis v. Washington, 126 S.Ct. 2266 (2006).

[8] *E.g.*, State v. Barnes, 854 A.2d 208, 211 (Me. 2004).

## III. Forensic Tests Play a Very Large and Expanding Role in the Criminal Justice System, and if Decisions Like the One Below are Allowed to Stand, Many Criminal Trials Will be Conducted by Certificate.

It has been a commonplace for decades that courts have made "ever-increasing use of scientific evidence." Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *A Half-Century Later*, 80 COLUM. L. REV. 1197, 1199 (1980). As this Court said half a century ago, "Modern community living requires modern scientific methods of crime detection lest the public go unprotected." *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957). At least in the criminal context, the principal importance of scientific, or quasi-scientific, evidence[9] is not the use of novel techniques or theories of the type that spawned *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny. Rather, it is in the routine use of work-a-day tests to determine such matters as the chemical composition of suspected drugs, the presence of alcohol, or the identity of the person who left a fingerprint or a DNA stain at the scene of a crime.

*Amicus* is not aware of statistics showing the frequency with which various tests are actually offered into evidence, but data on requests for forensic services give a good idea of the magnitude of the phenomenon. According to a study conducted by the Bureau of Justice Statistics in 2003 and 2004,

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[9] There is no need to enter here into the debate over whether such techniques as fingerprint evidence should be considered scientific.

> crime laboratories received about 2.7 million requests for forensic laboratory services [during 2002] and were able to process just under 2.5 million of these requests during the year. The most frequently requested forensic laboratory service, the identification of controlled substances, resulted in nearly 1.3 million requests during the year or about half of all requests. Toxicology samples (468,000) and latent print requests (274,000) were the next most common types of samples for which laboratory analyses were requested. Law enforcement agencies submitted about 61,000 requests for DNA analysis — about 2 percent of all requests for laboratory services, to publicly operated crime labs — just under 42,000 of these were processed during the year.

Bureau of Justice Statistics, *Federal, State and Local Crime Lab Backlog Reached 500,000 in 2002* (2005), <http://www.ojp.gov/ bjs/pub/press/cpffcl02pr.htm>.[10]

The role of such forensic tests in the criminal justice system will almost certainly grow. Consider just DNA testing, which as of now is a relatively small part of the overall picture of forensic testing. But its role, at least in absolute terms, is sure to increase. Among the reasons are the following:

• DNA tests are now far more sensitive than they were a decade ago. *See, e.g., State v. Craig*, 853 N.E.2d 621 (Oh. 2006), *cert. denied*, 127 S.Ct. 1374 (2007)

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[10] There are about a million felony convictions in state court per year, about one-third of them involving drug offenses. Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons, 2004 – Statistical Tables*, <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04101tab.htm>.

(insufficient DNA collected to allow identification in 1996; samples tested in 2002 using newer technique, and identification made). That trend will very likely continue. *See* Pamela J. Smith & Jack Ballantyne, *Simplified Low-Copy-Number DNA Analysis by Post-PCR Purification*, 52 J. FORENSIC SCI. 820 (2007) (reporting successful typing of traces of DNA on fingerprints found on paper and glass).

• The Combined DNA Index System (CODIS), a nationwide network of databases of DNA profiles, was assembled beginning in the 1990s. It is growing rapidly; as of May 2007, it included approximately 4.76 million profiles,[11] and by October 2007 that number had already increased to approximately 5.27 million.[12] Greatly expanded criteria for inclusion in the databases will likely promote accelerated growth.[13] Larger databases mean an increased chance of identifying an unknown perpetrator by matching a crime-scene sample with a profile in the database.

• Intimidation of witnesses may induce prosecutors to place greater reliance on forensic testing – and to charge crimes that can largely be proved through such testing. David Kocieniewski, *Keeping Witnesses Off Stand to Keep Them Safe*, N.Y. Times, Nov. 19, 2007, p. A1.

• Jurors have an increased expectation of forensic evidence, which prudent prosecutors must heed. As

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[11] Wikipedia, *Combined DNA Index System* (2007), <http://en.wikipedia.org/wiki/ Combined_DNA_Index_System>.

[12] National DNA Information System, *NDIS Statistics* (2007), <http:// www.fbi.gov/hq/lab/codis/clickmap.htm>.

[13] *See* Cal. Penal Code § 296(a)(2)(C) (West 2005) (providing for DNA testing of all felony arrestees beginning in 2009).

one recent study concluded:

> [T]here are now significant numbers of summoned jurors who expect scientific evidence in every criminal prosecution. . . . [U]nless the prosecution presents some scientific evidence, there are significant numbers of summoned jurors who will acquit defendants in cases of circumstantial evidence and in rape cases. The cause of those increased expectations and demands cannot simply be laid at the feet of television programs. . . . [They are] more likely the result of much broader cultural influences related to modern technological advances, what we have chosen to call a "tech effect."

Donald E. Shelton, et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, 9 Vand. J. Ent. & Tech. L. 331, 362 (2006).

Increasingly, then, we can expect that the key issues in criminal cases will be proven by evidence of forensic tests. This development holds out the possibility of improved crime detection and increasing accuracy in fact-finding. But it also means that if decisions like the one below, approving the introduction of reports of tests without the author of the report testifying subject to adverse examination, our criminal justice procedure will have been fundamentally altered: Trial by certificate will become a prominent fixture in it. The witness providing hte information essential to conviction will testify out of court, in writing, not necessarily under oath, and not in the

presence of the accused or subject to examination by him. This Court should not allow such a system to arise, or even give it any chance to gain momentum.

## CONCLUSION

For the foregoing reasons, the Court should grant a writ of *certiorari* and reverse the decision of the Appeals Court of Massachusetts.

Respectfully submitted,

RICHARD D. FRIEDMAN
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December 3, 2007

# JOINT APPENDIX

95

(6)

FILED

JUN 16 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-591

IN THE

# Supreme Court of the United States

Luis E. Melendez-Diaz,
*Petitioner,*

v.

Massachusetts
*Respondent.*

On Writ of Certiorari
to the Appeals Court of Massachusetts

## JOINT APPENDIX

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June 16, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

**Petition for Certiorari filed October 26, 2007**
**Certiorari granted March 17, 2008**

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| DATE | COURT AND PROCEEDINGS |
|---|---|
| 03/04/2002 | Commonwealth of Massachusetts, Suffolk Superior Court. Indictments Returned. |
| | * * * * |
| 03/10/2002 | Commonwealth of Massachusetts, Suffolk Superior Court. Pretrial Conference Report Filed. |
| | * * * * |
| 03/14/2002 | Commonwealth of Massachusetts, Suffolk Superior Court. Arraignment and Plea. |
| | * * * * |
| 09/09/2004 | Commonwealth of Massachusetts, Suffolk Superior Court. Trial Commences. |
| 09/10/2004 | Commonwealth of Massachusetts, Suffolk Superior Court. Trial Continues and Defendant's Motion for a Required Finding of not Guilty at the Close of the Commonwealth's Case Denied. |
| | * * * * |
| 09/13/2004 | Commonwealth of Massachusetts, Suffolk Superior Court. Trial Concludes, Defendant's Renewed Motion for a Required Finding of Not Guilty Denied, and Sentence Imposed. |
| | * * * * |
| 09/20/2004 | Massachusetts Appeals Court. Notice of Appeal Filed. |

| DATE | COURT AND PROCEEDINGS |
|---|---|
| | * * * * |
| 10/16/2006 | Massachusetts Appeals Court. Oral Argument Heard. |
| | * * * * |
| 07/31/2007 | Massachusetts Appeals Court. Decision Issued. |
| | * * * * |
| 09/26/2007 | Supreme Judicial Court of Massachusetts. Further Appellate Review Denied. |
| | * * * * |

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPT.
OF THE TRIAL COURT
NO(S). 2002-10212

---

COMMONWEALTH

v.

LUIS MELENDEZ-DIAZ

---

PRETRIAL CONFERENCE REPORT
PURSUANT TO RULE 11, MASS. R. CRIM. PRO.

The Assistant District Attorney and Counsel for the Defendant in the above-entitled case agree to the following:

A. PROCEDURE:

1. The *Discovery Motion date* will be (subject to approval by the court) 6/4/02.
2. The Defendant is NOT if presently in custody at _____. (specify NOT if not in custody)
3. A writ of habeas corpus to_____ will be necessary to bring the Defendant into court.
4. A case will be a jury trial unless otherwise specified here (*nonbinding*) [illegible].
5. The probable length of the trial will be 2-3 days.
6. The TRIAL DATE will be (*nonbinding*) _____ (subject to approval by the court).
7. A SPANISH language interpreter will be necessary.

8. The allowing problems with the availability of witnesses are anticipated:

_____

_____

9. Copies of indictments and criminal histories of the Defendant and DOB's of known prospective witnesses will be provided forthwith by the prosecutor by joint request of the court request of the court.

_____

_____

10. COMMONWEALTH COMPLIANCE DATE: _____

11. DEFENDANT'S COMPLIANCE DATE IS 14 DAYS AFTER THE COMPLETION OF COMMONWEALTH'S COMPLIANCE UNLESS OTHERWISE SPECIFIED HERE _____

B. MANDATORY DISCOVERY PURSUANT TO RULE 14 (a)(1):

1. The District Attorney agrees to furnish the following mandatory discovery to Defense Counsel:

(a) written or recorded statements of the defendant within the possession, custody or control of the prosecutor or agents.

(b) Grand Jury Minutes

(c) Exculpatory evidence within possession, custody or control of the prosecutor or agents.

C. DISCRETIONARY DISCOVERY PURSUANT TO RULE 14 (a)(2):

1. The District Attorney agrees to furnish the following discretionary discovery to Defense Counsel:

(a) Names, dates of birth of prospective Commonwealth witnesses

Dates of birth and home addresses of police officers will not be provided by the Commonwealth. In lieu of their production the Commonwealth will provide the name and address of an agent who will accept service 24 hours per day if it were in hand to police officers when left at the agent's address or Commonwealth will accept the responsibility of producing the police officers as if they were served in hand so long as Defendant produces a timely witness list. (*Check one below*)

Comm. provides agent ☐

Comm. produces officer ☑

(b) Police reports in the possession, custody or control of the prosecutor or agents including incident reports, notes, applications for complaint and booking sheet reports relating to Defendant or Co-Defendant(s).

(c) Any written or recorded statements of prospective witnesses in the possession, custody or control of the prosecutor or agents including but not limited to copies of turret tapes, tapes of radio transmissions and phone conversations and other court proceedings and transcripts of these statements if produced.

(d) Scientific test reports in the possession, custody or control of the prosecutor, agents or prospective witnesses.

(e) Reports of psychiatric or physical examinations of any prospective witness or party in possession, custody or control of the prosecutor; agents or

prospective witnesses except the following involving the following persons:

Excluding P.O.'s

(f) Defense Counsel can inspect any physical evidence within the possession, custody or control of the prosecutor or agents.

If the prosecutor makes items available for inspection, photocopying or photographing at the prosecutor's office, the prosecutor will provide a list of items that are prospective evidence, their location, name of contact person and this executed PTC Report will serve as written permission (order – if endorsed by court) for access to items and authority to copy and photograph.

(g) Promises, inducements or rewards made by the prosecutor or agents to any prospective witnesses.

(h) Name, address, area of expertise, credentials, and expected opinion of prospective expert.

(i) Certified convictions to be used against Defendant or defense witnesses and a bill of particulars evidencing any prior bad acts by Defendant or defense witnesses.

(j) Surveillance location with reasonable specificity. Including, but not limited to, address, indoors or outdoors, use of vehicle and distance from street level (e.g. second floor).

D. RECIPROCAL DISCOVERY PURSUANT TO RULE 14 (a)(3):

Defendant will provide timely notice of the following only the Defendant intends to use for the case in chief:

(a) Notification, according to Rule 14 (b)(2), of a defense of lack of criminal responsibility because of mental disease or defect.

(b) Notification, according to Rule 24 (b)(1) and 14 (e), any alibi defense.

(c) Notification, according to Rule 14 (b)(3) of an intent, to rely upon a defense based upon a license, claim of authority or ownership or exemption.

(d) Names, dates of birth and addresses of witnesses.

(e) Any written or recorded statements of any witness, excluding the Defendant in the possession, custody or control of Defense Counsel or agents including but not limited to tapes and transcripts.

(f) Any scientific, psychiatric or physical examination reports of any party or witness in the possession, custody or control of Defense Counsel or agents.

Defendant must provide fourteen days after Commonwealth completes compliance or 14 days before actual trial date, whichever is later.

E. DISCRETIONARY DISCOVERY REQUIRING A COURT ORDER:

1. The parties agree that the following materials be provided at the discretion of the Court upon motion by either party:

(a) Criminal History System Board or Probation Department Record of Conviction of any Commonwealth or Defense witness.

F. STIPULATION OF FACT: NONE

1. The parties stipulate as to the following (strike those which the Defendant does not stipulate):

(a) Authenticity of Ballistics Reports

(b) Authenticity of Hospital/Medical Records

(c) Authenticity of Drug Analysis

(d) Authenticity of RMV Documents

(f)

(g)

The Defendant hereby consents to the above stipulations of fact which will bind Defendant (and successor counsel.) Defendant does so intelligently, willingly and freely with knowledge of the consequences of this act this ___ day of _____

_____
Defendant

G. OTHER PRETRIAL MOTIONS:

1 Counsel for the parties cannot agree on the following motions to be filed according to Rule 13 (d)(2)(A):

(a) All motions of an evidentiary nature.

(b) Defendant reserves the right to be heard on additional discovery and evidentiary motions filed within 14 days of the Commonwealth's completing discovery or 14 days before actual trial for good cause shown.

(c) Defendant may appear ex-parte without notice for funds motions. Forty-eight hour notice to the Clerk's Office is required unless the presiding justice or designee permits a shorter time.

We do hereby certify that the above Pretrial Conference Report was agreed to on the 9th day of April 2002.

/s/ [Illegible] Assistant District Attorney/
Assistant Attorney General
Address: 1 Bulfinch Place
Boston, MA 12114
Phone: (617) 615-7091

/s/ [Illegible] Attorney for Defendant
Address: 512 Gallivan Blvd.
Dorchester, MA 02124
Phone: (617) 282-2300

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
SUCR 2002-10212

SUFFOLK, ss.

---

COMMONWEALTH OF MASSACHUSETTS,

vs.

LUIS E. MELENDEZ-DIAZ.

---

JURY TRIAL DAY ONE

TRANSCRIPT OF PROCEEDINGS

Before: Rouse, J
September 9, 2004
Boston, Massachusetts

APPEARANCES:

WILLIAM FREEMAN, Esquire, Assistant District Attorney, for the Commonwealth

JOHN MOSS, Esquire, for Defendant Melendez-Diaz

SAMUEL RODRIGUEZ, Esquire, for Defendant Montero

* * * *

[78] MR. MOSS: Just briefly, Your Honor. Thank you. Ladies and gentlemen of the jury, as you know, I represent Mr. Melendez-Diaz and I just have two things to remind you of right now of what the judge told you earlier. You've listened to the DA's opening but you have heard no evidence, no evidence has been presented to you yet, and when you do hear the evidence, I ask you first, are you going to believe it, is it believable, and if you believe it, does it prove to you

beyond a reasonable doubt that this man was in possession of the drugs that day as opposed to the other two people in the back of the cruiser, that this man was in possession of [79] the money that was found, that this man was trafficking in cocaine as opposed to any of the other two people.

And let me just suggest to you, that's the whole issue in the case. Was it this man? Another man? Another man? Who was selling, who was buying, who was possessing? And if you have a reasonable doubt, then you'll find the defendant, Mr. Melendez-Diaz, not guilty and that's all I'll ask you at the end of the case.

* * * *

[83] PAUL W. MURPHY, called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FREEMAN:

Q Sir, would you tell us your name, spelling your last name for the record?

A Yes. My name is Paul W. Murphy. Last name is spelled M-u-r-p-h-y.

Q Are you employed?

[84] A Yes.

Q How are you employed?

A I am a sergeant detective with the Boston Police drug control unit.

Q How long have you been with the Boston Police Department?

A Over nineteen years.

* * * *

[85] Q Now, as part of your being a Boston Police officer in the drug control unit, have you [86] received any specialized training in the area of drugs?

A Yes.

Q Okay. Would you detail that for the Court?

A I have attended a two-week course in basic drug investigation given by the DEA, a one-week course given in undercover drug investigation given by the FBI and—

* * * *

Q Please continue.

A Numerous other seminars that dealt with different aspects of drug investigation such as confidential informants in the use of drug investigations, search warrants and their preparation, clandestine laboratories, manufacture of amphetamines and other related topics. I have also been the affiant on or [87] assisted in the preparation of over two hundred search warrants to search for drugs and weapons.

I have purchased cocaine, heroin, marijuana, pharmaceutical drugs in an undercover capacity. I have made well over five thousand arrests on this job, the majority of them were drugs. I've conducted hundreds of surveillances of people selling and buying drugs on the street and I've used informants to do this as well and I've watched them buy drugs.

Q You previously stated that you've made over five thousand arrests. Is that correct?

A Yes.

Q Have any of them entailed the seizure of narcotics?

A A lot of them, yes.

Q On any occasion have you had occasion to seize cocaine?

A I have.

Q Approximately how many times?

A Hundreds.

* * * *

[89] Q Okay. In November of 2001 were you familiar with street level drug transactions that took place in the area that you were patrolling?

A Yes.

Q Okay. What types of drugs were primarily done in these or sold, transferred from one person to another in these types of street level transactions?

[90] A Cocaine, heroin, marijuana, some pharmaceutical drugs, but we deal mostly with heroin and cocaine in the area that I patrol.

Q Who are the individuals involved in these street level drug transactions?

A Meaning the buyers and sellers?

Q Those terms, what do you mean by a buyer, what do you mean by a seller?

A A buyer is simply generally an addict, a person who uses drugs and will contact his or her dealer and the seller is simply—I don't know how to explain it other than it's self-explanatory. It's a person who deals drugs for money.

Q Now, how do the drugs get from the buyer to the seller—from the seller to the buyer?

A The most popular method now how drugs were sold, they were back then but now as well, is by motor vehicle delivery of drugs. Back then people used pagers as well as cell phones but now pagers are kind of out. Everybody uses cell phones. You have the dealer's cell phone and you contact the dealer and the

dealer generally delivers the drugs now by car. Everything is done by car.

MR. RODRIGUEZ: Objection.

[91] MR. MOSS: Objection.

THE COURT: He may have it.

A (continued) Drugs are sold by car now to avoid police surveillance.

BY MR. FREEMAN:

Q When you say drugs are sold by car, specifically how is the car used in the street level drug transaction?

MR. MOSS: Objection.

MR. RODRIGUEZ: Objection.

THE COURT: Overruled.

A We call it, most police that deal with it just deliveries and it's simply, the car delivers the drugs. If the buyers are waiting in a motor vehicle, they'll generally follow each other to a location that they deem safe and then somebody will enter the other car where the transaction takes place within the car. If the buyer is on foot, the car will arrive, the buyer will get into the car and they will take basically a meaningless ride, this is what we always see, it's either a ride around the block to nowhere or, say the person is waiting at an MBTA train stop, it will be from one train stop to another [92] when they could have taken the train.

MR. MOSS: Objection, Your Honor.

THE COURT: He may continue.

A (continued) It could be just a ride for, say, like twenty feet or forty yards, like a ride to nowhere and within the brief ride that makes no sense is when the transaction takes place within the car.

BY MR. FREEMAN:

Q Why does there have to be movement? Why does there have to be movement between—for the meaningless ride? Why would you have people going from one point to another? Why not just stop in one place?

A I mean, it does happen but the majority of the time they move. It's just to avoid police surveillance. If there's a drug unit officer out there like me and if I see someone standing out there, watching cars or making phone calls or it looks like they're waiting for somebody, that's something I usually look for, I see a car parking, especially, say, in a store parking lot like a McDonald's, may have run in to buy food, something like that, I'll sit there and I'll wait [93] for that person, I'm always in a regular car, and I wait for one of these cars to come and this is how we make arrests.

Q Now, you mentioned that cars are more prevalent, the use of cars is more prevalent now, is that correct?

A Yes.

Q Were cars used in the manner in which you described back in November of 2001?

A Yes.

Q Okay. Now, I believe you also talked about the use of cell phones and pagers, pagers not so much now but cell phones?

A Yes.

Q As well, is that right? Now, were both pagers and cell phones used back in 2001?

A They were.

Q Okay. And for what purpose were these items used?

A Just to maintain contact between the buyer and seller, to arrange a transaction.

MR. MOSS: Objection, Your Honor.

THE COURT: Overruled.

* * * *

[94] Q And when you made these arrests that you previously referred to in which you seized cocaine, have you seized anything from individuals besides the cocaine, the cell phones, and the pagers that you referred to?

A At times currency.

Q Okay. When you talk about currency, what type of denominations are we talking about?

A It varies but all money seized from a suspected drug dealer that just engaged in activity that I just testified to is taken and seized because it's believed by the police that it's profits from drug dealing. In terms of denominations, it could be any type of denominations. Most of the time drug dealers will have a wide variety of denominations because they meet a wide variety of customers, all of whom have different amounts of money. It could be ones, five's, ten's, or twenty's.

* * * *

[96] Q Are you familiar with how cocaine was packaged back in 2001?

A Yes.

Q Okay. Was cocaine broken down for sale in any particular increments?

A It's sold in different amounts and priced according to the amount of cocaine in the bag. It's packaged primarily in plastic bags, a corner of a sandwich bag that you put your sandwich in, and the amount is put in there and wrapped and knotted and cut off.

* * * *

[97] Q Now, these packaging sizes, essentially there's different sizes, is that correct?

A Yes.

Q Now, have you come across essentially different amounts of these plastic bags containing cocaine when you do these seizures?

A Yes.

Q What are some—I mean, how much? What are we talking about?

A You can buy, depends if it's crack or powder, you know, we deal with a lot of powder and so forth.

Q Let's stick with powder.

A It can be a forty dollar bag of cocaine. It's usually point four zero grams within the bag and it's forty dollars. You can get a fifty dollar bag, a sixty dollar bag. You can get an eight-ball of cocaine.

Q What's an eight-ball of cocaine?

A It's one point seven five, I believe it is, and then, you know, you can get a quarter ounce but that's more of a mid-level dealer, buying something like that, not a regular street user.

* * * *

[105] Q Sir, I'm showing you something and asking if you've ever seen anything like that before?

A Yes.

Q Okay. When have you seen an item like that before?

A These are bags of cocaine that have been tested by the state laboratory.

Q Okay. But to be clear, you were not involved in this investigation, is that correct?

A I was away that week at a training seminar when this happened.

Q Okay. Alright. But what appears to be in this plastic bag that I've handed you?

A Cocaine and the plastic bag that it's packaged in.

Q You can see the plastic bag that's in there, is that right?

[106] A Yes.

Q How many containers of plastic bags or how many containers are inside the sealed plastic bag?

A It looks like there's four.

Q Okay. Now, can you take a look at the size of the small plastic bag that's contained in each one of those four plastic bags?

A Yes.

Q Do you, based on your training and experience, have an opinion as to the amount of money it would cost to purchase one of those by the size?

A Probably eighty or a hundred dollars.

MR. FREEMAN: Okay. Thank you. I just ask that that be marked for identification if I may.

THE COURT: It may be marked A for identification.

* * * *

[107] Q Now, showing you what's been marked A and the new item that I've just handed you, do you recognize what's contained in there—or, excuse me, have you seen something like that before?

A I have, yes.

Q Okay. And what does that appear to you to be?

A It looks like cocaine.

Q Is that similar to what's been marked as Exhibit A for identification?

A Yes.

Q Alright. Again, an I ask you to see whether or not, just by looking at the container there, whether or not there's a plastic bag in there?

A Yes, there is in there.

Q Okay. And again, is there a specific size to that plastic bag?

A It looks like the same and actually I think I said four in this one before but it looks like these bags are folded in half. It looks like there's two in here and two in here but these bags are just about the same size as these two and it looks like the same amount of cocaine.

Q Okay. Thank you. So would the amount or the size of the bag be the same as you previously [108] testified to?

A It looks about the same. I'd have to see the weight to verify it but it looks similar.

MR. FREEMAN: I'd ask that that be marked for identification as well.

THE COURT: Yes.

(Exhibit B, being a plastic bag, as described above, was produced and marked for identification.)

MR. FREEMAN: May I approach?

THE COURT: Yes.

BY MR. FREEMAN:

Q Sir, I show you a third item, ask if you've ever seen anything like that before.

A Sure, I have, yes.

Q Okay. And what does it appear to you to be?

A It's multiple bags of cocaine. You can see the plastic bag under this one and this one here, you can see one in this one. They look to be about the same size bags.

Q Okay. And again the same size as what bags?

A As those within this envelope as well as the ones you just showed me.

Q Okay. Thank you very much. Do you have an [109] opinion, based on your training and experience, as to the value of each of these bags?

A I mean, you could probably sell those for a hundred. If you were a good customer, you would get them for cheaper, maybe eighty dollars or so.

MR. FREEMAN: Thank you. I'd ask that that be marked for identification.

(Exhibit C, being a plastic bag, as described above, was produced and marked for identification.)

* * * *

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT OF
THE TRIAL COURT
SUCR 2002-10212

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COMMONWEALTH OF MASSACHUSETTS

v

LUIS E. MELENDEZ-DIAZ

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JURY TRIAL DAY TWO

TRANSCRIPT OF PROCEEDINGS

Before: Rouse, J
September 10, 2004
Boston, Massachusetts

APPEARANCES:

WILLIAM FREEMAN, Esquire, Assistant District Attorney, for the Commonwealth

JOHN MOSS, Esquire, for Defendant Melendez-Diaz

SAMUEL RODRIGUEZ, Esquire, for Defendant Montero

* * * *

[23] THE COURT: Anything more, Mr. Moss?

MR. MOSS: Nothing further?

THE COURT: Mr. Rodriguez?

MR. RODRIGUEZ: Nothing further.

THE COURT: Thank you, sir. You may step down.

THE WITNESS: Thank you, Your Honor.

MR. FREEMAN: Robert Impega. May I proceed, Your Honor?

THE COURT: You may.

ROBERT IMPEGA called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FREEMAN:

Q Good morning, sir. Could you tell us your name, spelling your last name for the record?
A Robert Impega, I-m-p-e-g-a.
Q And are you employed, sir?
A Yes, I am.
Q Who are you currently employed by?
A Winthrop Police Department.
Q Okay. Directing your attention to November of [24] 2001, were you also employed?
A Yes, I was.
Q Who were you employed by then?
A That was K-Mart retail store.
Q And what is the position you held at the K-Mart?
A Loss prevention manager.
Q Okay. And what's a loss prevention manager do?
A Responsible for controlling the shrinkage in the store, internal theft, external theft, any other issues that might arise.
Q For any particular store?
A The store I was stationed out of was South Bay, Dorchester.
Q Okay. Does it have a street address?
A I believe it's Allstate Road. I'm not too sure of the number.
Q Is that in a shopping center?

A Yes, it is.

Q Okay. Now, you said controlling the shrinkage, is that right?

A Yes.

Q Okay. Is that theft, shoplifting, things of that naturae?

A Yes. Theft, damaged property, shoplifting.

* * * *

[35] store, front door of the store.

Q What happened when he got to the front of the store?

A At this point Detective Pieroway, along with another patrol officer, detained him.

Q Okay. And were you part of this detention?

A Yes.

Q Now, do you know whether or not in your presence Detective Pieroway had a conversation with Mr. Wright?

A Yes, he did.

Q Okay. Do you know whether or not Detective Pieroway searched Mr. Wright?'

A Yes, he did.

Q Do you know whether or not Detective Pieroway recovered anything from Mr. Wright?

A Yes.

Q Okay. Did you see what was recovered?

A What was recovered, four small bags of a white powder substance that appeared to be cocaine.

Q Okay. Now, at some point—do you know what happened to Mr. Wright after the four plastic bags with the white powder substance were recovered?

* * * *

[52] Q Isn't it true that you did not observe any drug transaction?

A I personally did not observe any drug transaction.

* * * *

[56] Q Would you point them out?

A The two individuals at the table.

MR. FREEMAN: Thank you. Your Honor, may the record reflect he has identified the defendants?

THE COURT: Thank you. Anything more, Mr. Moss?

MR. MOSS: Nothing further.

THE COURT: Mr. Rodriguez?

MR. RODRIGUEZ: Nothing further.

THE COURT: Thank you, sir. You may step down.

MR. FREEMAN: Robert Pieroway. May I proceed, Your Honor?

THE COURT: Yes, please.

ROBERT JOHN PIEROWAY, called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FREEMAN:

Q Sir, would you tell us your name, spelling your last name for the record?

A My name is Robert John Pieroway. That's spelled [57] P-i-e-r-o-w-a-y.

Q And are you employed, sir?

A I am.

Q How are you employed?

A I'm a Boston Police detective.

Q Okay. And where are you currently assigned?

A I'm assigned to the Boston Police drug control unit. Currently I'm detailed to the C-6 section of the City of Boston.

Q And the drug control unit, did it have a prior designation or a prior name? The drug control division, if I might suggest

A I've always known it by the Boston Police drug control unit.

Q How long have you been with the drug control unit of the Boston Police Department?

A Since September 23 of 1987.

* * * *

[69] A As they were going in the middle of it, when Mr. Wright, when he first got in the vehicle, he was sitting down, was now leaning towards between both individuals. I had the back of him, his body, but he was leaning between both individuals that were in the front.

Q So your vantage point is in through the back window of the vehicle?

A That was—yes, that's correct.

Q. And what, if anything, did Mr. Wright appear to be doing at this point?

A It seemed like he was—I couldn't see his hands but he was leaned forward with the two individuals in the front.

Q Could you see his head?

A I could see his head.

Q What, if anything, was his head doing?

A It was leaned forward.

Q Now, what happened after you observed Mr. Wright [70] leaning forward over the front seat?

A He leaned backwards, the car stopped. He then exited the motor vehicle and started walking back towards K-Mart.

* * * *

[73] Q Okay. Did you have a conversation with Mr. Wright at that time?

A I did.

Q As a result of that conversation, did you search Mr. Wright?

A Yes.

Q Okay. What, if anything, happened when you [74] searched Mr. Wright?

A I recovered a plastic bag that contained four clear white plastic bags of cocaine in his front right pocket that appeared to be at least gram size.

Q And have you ever seen any items like that before in your history with the Boston Police Department?

A I have.

Q On how many occasions?

A Well, in excess of two thousand times.

Q And what did you suspect those to be on November 15, 2001?

A Cocaine.

Q Now, when you recovered those items from Mr. Wright, where on his person did you recover them from, if you recall?

A His pants pocket.

Q Right? Left?

A I think it was his right.

* * * *

[75] Q Sir, I'm showing you what has been marked as Exhibit B for identification. I ask you if you've ever seen those two items before.

A Yes. These are the four plastic bags I recovered [76] from Mr. Wright's person.

Q Could you describe how these four plastic bags

that you recovered from Mr. Wright are packaged today?

A They are inside the submission envelope. This outside envelope is done by the Food and Drug laboratory. The inside is another clear plastic bag that's submitted at District C-6. The plastic bags are entered inside those and sealed, but the chemist had opened them up and you can see here clearly how it is. They're plastic bags with a little knot tied on it that opens up.

Q Okay. Now, previously you stated that you had seen items like these before, is that correct?

A I have.

Q And that you had made some two thousand arrests and seizures of cocaine, is that right?

A At least.

Q Okay. In those prior occasions when you seized cocaine, what have you done with it after you've taken it?

A Whatever district you're working at, whatever police station you're working at, the area you're working at, you go to that police station and [77] forms are filled out and then they're submitted to the Food and Drug laboratory in Jamaica Plain, South Street, for analysis.

Q Now, do they go into a safe at the station?

A They do.

Q Okay. From the safe where do the drugs go?

A They go, in Hyde Park there's a drug depository there where all the drugs go, two officers pick up the drugs from each station, they bring them, they check the log sheet, they sign the log sheet, they bring them out to Hyde Park and from Hyde Park they are put into a computer and given a number and then from there, I believe they go daily out to the Food and Drug laboratory.

Q And what happens at the Food and Drug laboratory, if you know?

A They are analyzed, they're weighed and analyzed.

* * * *

[79] Q The four plastic bags that you seized from Mr. Wright, do you recognize what's been marked as Exhibit A and Exhibit B for identification?

A Yes.

Q Okay. What do you recognize those two items as?

A The cocaine that we recovered from Mr. Wright.

Q Now, you previously described that—

MR. FREEMAN: Well, actually at this point I just ask that these two items be [80] submitted as exhibits.

MR. MOSS: No objection.

MR. RODRIGUEZ: No objection.

(Exhibit Nos. 8 and 9, being drugs, as described above, were marked and admitted into evidence.)

BY MR. FREEMAN:

Q I show you what's been marked as Exhibit 8 and Exhibit 9. You described previously drugs are taken to the state laboratory for analysis. Do you know whether or not those drugs were taken to the state laboratory for analysis?

A They were.

Q Do you know whether or not any documentation was generated regarding their analysis?

A Yes, I do.

Q Okay. I show you two documents and ask if you recognize them.

A Yes, sir. The numbers here are the numbers, this number 615743 is the number given by the Food and Drug laboratory. It's put on the outside and it's matched up with the plastic bags.

Q Okay. Let me show you these. So these are the certificates of analysis for these two items that [81] were submitted?

A Yes.

Q Okay. Let's go with what's marked as Exhibit 8. Exhibit 8 is what was submitted for analysis to the state lab?

A Two plastic bags.

Q And what is the result of the analysis, if you know?

MR. MOSS: Objection.

THE COURT: He may answer that. It will be marked?

MR. FREEMAN: Yes, I will mark it.

THE COURT: Would you mark it?

MR. FREEMAN: I'll mark it right now. Your Honor, I'd ask that these two certificates of analysis be marked as exhibits.

MR. MOSS: I object, Your Honor, Crawford versus Washington,

THE COURT: The objection is overruled.

(Exhibit Nos. 10 and 11, being certificates of analysis, as described above, were marked and admitted into evidence.

BY MR. FREEMAN:

Q I show you now what's been marked Exhibit 11. [82] What was submitted for analysis on Exhibit 11, if you recall?

A Two plastic bags.

Q Okay. And the result of the analysis?

A The substance was found to contain cocaine, a derivative of the cocoa [sic] leaf.

Q Now, as part of the analysis, do you know whether or not they weigh the substance?

A They did in this case, yes.

Q Okay. And what is the weight?

A Two point three four grams.

Q Okay. And this certificate of analysis goes with Exhibit 8, is that correct?

A Correct.

Q Now, there was a second set of plastic bags referenced in Exhibit 9, is that right?

A Correct.

Q Alright. Was that also analyzed?

A Yes.

Q And the results of the analysis?

A Was found to contain cocaine.

Q Okay. And do you know whether or not they weighed it?

A Yes, they did.

[83] Q And the weight?

A Two point four one grams.

Q Now, Exhibit 8 and Exhibit 9, these are plastic bags of cocaine, is that right?

A Yes.

Q Have you ever seen a plastic bag of cocaine of this size before November 15, 2001?

A I did.

Q On how many occasions?

A I'd say at least a thousand times.

Q Okay. These prior occasions that you've seen bags of this size of cocaine, do you know whether or not they have a specific monetary value, specific amount?

A I know what they could sell for.

Q Okay, What would they sell for?

A A hundred, I'd say eighty to a hundred dollars per bag.

* * * *

[96] Q Did you see Officer Anderson outside the booking area?

A Yes.

Q Where was he?

A He was at the cruiser.

Q Which side of the cruiser?

A The passenger's side—I mean, the driver's side but it was on the right side where the two gentlemen had exited.

Q And did you go to that area?

[97] A No. I was looking down.

Q Okay. And what, if anything, was Officer Anderson doing in your presence?

A He picked up what appeared to be a lot of money that he said he found on the ground and a plastic bag that contained nineteen plastic bags of cocaine that were recovered in the seat where the two gentlemen were sitting.

Q And what did he do with that plastic bag with the substance you described as cocaine? What did he do with that?

A He gave them to me.

Q I show you what's been marked for identification as Exhibit C and ask if you recognize it.

A Yes. These were the nineteen plastic bags that were recovered by Officer Anderson inside the floor behind the driver of the marked police cruiser.

Q Okay. And did you also submit those for analysis along with the other plastic bags you recovered from Mr. Wright?

A Yes.

Q Okay. And were they, to your knowledge, were they tested by the state lab?
[98] A Yes.

MR. FREEMAN: May I approach?

THE COURT: Yes.

BY MR. FREEMAN:

Q I show you that and ask if you recognize it.
A This is the analysis of the nineteen plastic bags that were recovered.
Q And what was it found to be?
A Cocaine—
Q And did they weigh it to your knowledge?
A Yes, they did.
Q And what was the weight?
A Twenty-two point sixteen grams.

MR. FREEMAN: Okay. I'd ask that the cocaine marked as Exhibit C and the certificate of analysis be marked as exhibits.

MR. MOSS: Objection to the certificate.

THE COURT: The objection is overruled.

* * * *

[99] (Exhibit No. 12, being drugs, and Exhibit No. 13, being a certificate of analysis, as described above, were marked and admitted into evidence.)

BY MR. FREEMAN:

Q Detective Pieroway, at the break we were talking about Exhibit 12, is that correct?
A Yes.
Q And I believe you said that you first observed Exhibit 12 when Officer Lamont Anderson had that with him at the side of the cruiser, is that right?

A Yes.

Q Now, you had an opportunity to inspect Exhibit 12 when Officer Anderson gave that to you?

A I did.

Q Okay. And I believe you previously described it, it was a number of plastic bags, is that right?

[100] A Nineteen.

Q Alright. And it contained something?

A Yes, white powder, what I believed to be cocaine.

Q Now, these nineteen plastic bags, did you have an opportunity to look at them at the time that Officer Anderson recovered them?'

A I did.

Q And did they appear to be of a specific size or value to you?

A Yes. They appeared to be eighty to a hundred dollar bags. They appeared to be the same size and same packaging, same looks, everything as the four that I recovered from Mr. Wright. They are identical.

Q Now, you said that they appeared to be the same size and packaging of the four plastic bags that you recovered from Mr. Wright, is that correct?

A They were plastic bags with a knot tied with white powder.

Q And those are represented, the four plastic bags are represented in Exhibits 8 and 9, is that right?

A Yes.

Q Did you look at the color of the cocaine?

[101] A Yes. Cocaine is white.

Q Alright. And did the color of the cocaine appear to be uniform?

A Yes.

Q Now, the packaging, you stated the packaging appeared to be the same, is that right?

A Correct.

Q How was—in your experience, how is cocaine usually packaged?

A Cocaine is placed inside of corners of white plastic baggies that you have in your house, either generic or regular baggies. What the individual will do is use a—they usually have a scale. What they will do is put the cocaine on a flat surface, take the corner of the baggie, put the baggie on top of the scale, use something, a knife, razor blade, and scoop up the cocaine from the surface and place it into the corner of that baggie and then when the weight comes up with that purchase, the person that's selling that cocaine, then they'll take a scissors and cut the corner of that baggie and then from there, they're tied into a knot.

This way, when the buyer purchases the [102] cocaine, heroin, whatever, marijuana, they can see what they're purchasing. Then they'll flip the bag over on the other side so they can get the other corner and they do the same process. Usually we'll find at the stash location baggies with corners cut off, missing.

Q Now, did the cocaine in Exhibit 12 appear to have been packaged in the manner you just described?

A Yes, they were.

Q Okay. And did the cocaine that's in Exhibits 8 and 9 also appear to be packaged in the same method?

A Yes.

Q Okay. And again you're saying that the cocaine packaged in 8 and 9 appears to be the same size units as in Exhibit 12?

A Yes.

Q Okay. Now, the value that you're assigning to Exhibits 8 and 9 is eighty dollars?

A Yes.

Q Is that the value based on your experience in 2001?

A Yes.

* * * *

[113] Q Okay. Prior to Mr. Wright being placed in the cruiser, I believe you previously testified that you recovered two of the exhibits here, is that right?

A Correct.

Q Four bags of cocaine that was pursuant to a search, is that right, of Mr. Wright?

[114] A He told me where it was.

Q Okay. And you recovered those items?

A Yes.

* * * *

[119] CROSS EXAMINATION

BY MR: MOSS:

Q Detective Pieroway, did you search under Mr. Wright's clothing?

A Yes. I searched him.

* * * *

[120] Q And the substances that you took off of Mr. Wright and that were found in the back of the cruiser, you don't have any real knowledge of what's in there—except what came back from the lab, right?

A Report from the lab, yes.

Q It looks to you like drugs?

A Yes.

* * * *

[128] Q Alright. Now, isn't it tree [sic] that you testified that you could not see Mr. Wright's hands? Is that correct?

A I could not see his hands. His hands were in front of him.

Q Yes or no, is it true that you couldn't see his hands?

[129] A That's correct, sir.

Q Okay. Yes or no answer, isn't it true that you did not physically see what passed through Mr. Wright's hands, if anything?

A Correct.

Q Now let's turn to this police car. It's pretty tight back there, isn't it, the back of the cruiser?

A It's fairly tight. If you have a big guy, it's extremely tight. There's not a lot of room there.

* * * *

[138] LAMONT ANDERSON, called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FREEMAN:

Q Good afternoon, sir. Could you tell us your name and spell your last name for the Court?

A Lamont Anderson. L-a-m-o-n-t, A-n-d-e-r-s-o-n.

Q And how are you employed, sir?

A Boston Police.

Q How long have you been with the Boston Police Department?

[139] A A little over three years.

* * * *

[163] Q Okay. After you secured Mr. Wright, where did you go? Where did you go?

A I went back outside to the cruiser.

Q Why did you go back outside to the cruiser?

A Because they were moving around and I wanted to check the back seat.

Q Okay. And what happened as you exited the building at the stairs? What, if anything, did you see?

A I observed money on the ground.

* * * *

Q You stated you saw money, is that right?

A Yes sir.

Q Where in relation to the vehicle did you see the money?

A On the driver's side, passenger's side door.

Q What was the condition of the door? Was it open or was it closed?

A It was closed.

Q Alright. When you got—did you continue to go down the stairs?

A Yes, sir.

Q Okay. Did you get to the side of the vehicle?

A Yes, sir.

Q What did you do when you got to the side of the vehicle?

A Retrieved the money and I opened the car door.

Q Why did you open the car door?

A Check the back seat.

Q Okay. When you opened the back door to check the [165] back seat what, if anything, did you observe?

A I observed some drugs.

Q Specifically.

A I observed a white powder substance in the back of the car.

Q Was it loose?

A On the floor, yes, sir.

Q Was it in anything?

A It was in a plastic bag.

Q Okay. Where in the back seat or, excuse me, where in back of your cruiser after you opened the door did you see this?

A On the driver's side.

Q Was it on the seat?

A It was on the floor, like right by the partition, right by the—right by the front.

Q When you talk about the partition, you're talking about the partition between the front seat and the back seat?

A Yes, sir.

* * * *

[166] Q I'm showing you what's been marked Exhibit 12 and ask if you recognize it.

A Yes, sir.

Q And what do you recognize that as?

A Drugs, sir, the white powder substance, I mean, in the car.

Q On November 15, 2001?

A Yes, sir.

Q Okay. And is it in the condition essentially that you saw it in on November 15, 2001?

A Yes, sir.

* * * *

[181] Q Now, you testified that all three of the alleged defendants were placed into the back seat of a police cruiser, is that correct?

A Yes, sir.

Q And you had testified that Mr. Wright is a heavy-set man, is that correct?

A Yes, sir.

Q And you testified that this seat is a hard plastic seat, is that correct?

A Yes, sir.

Q So Mr. Wright is placed into this hard plastic seat, a heavy-set man with handcuffs behind his back, is that correct?

A Yes, sir.

Q And then you testified that Mr. Melendez-Diaz, who is a grown man here, was placed in with handcuffs behind his back and was placed in the same cruiser, is that correct?

A Yes, sir.

Q And you then testified that this gentleman here, who is also a grown man with his hands cuffed [182] behind his back, was also placed in the cruiser with the hard plastic seat, is that correct?

A Yes, sir.

* * * *

[185] DANIEL RYAN, called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FREEMAN:

Q Good afternoon, sir. Could you tell us your name, spelling your last name for the record?

A Good afternoon. My name is Daniel Ryan and that's R-y-a-n.

Q And you are with the Boston Police Department, is that correct?

A That's correct.

Q For how many years?

A A little over nine years, sir.

* * * *

[204] Q Do you know whether or not Officer Lamont Anderson returned to the station after going back outside?

A Yes, he did.

Q Okay. And what, if anything, did he have with him when he came back in the station?

A He had a bag of heroin—or cocaine.

Q Okay. Anything else with him that you recall?

A I believe he had some money.

* * * *

[209] Q How does one remove a prisoner from a police car?

A Just take them by the arm, move them out of there. It's pretty tight, pretty cramped in there actually so—

Q It's pretty cramped in that car, is that correct?

A Yes.

* * * *

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
SUCR 2002-10212

SUFFOLK, ss.

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COMMONWEALTH OF MASSACHUSETTS,

vs.

LUIS E. MELENDEZ-DIAZ.

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JURY TRIAL DAY THREE

TRANSCRIPT OF PROCEEDINGS

Before: Rouse, J
September 13, 2004
Boston, Massachusetts

APPEARANCES:

WILLIAM FREEMAN, Esquire, Assistant District Attorney, for the Commonwealth

JOHN MOSS, Esquire, for Defendant Melendez-Diaz

SAMUEL RODRIGUEZ, Esquire, for Defendant Montero

* * * *

[13] Again, we thank you for your anticipated attention. At this time we are going to begin with the closing argument being made by Mr. Moss on behalf of Mr. Melendez-Diaz. Thank you.

MR. MOSS: Thank you, Your Honor. Good [14] morning, ladies and gentlemen of the jury. Give me a moment here. I use some notes sometimes because I do have a senior moment every now and then, but

this is my last time to address you and I'm going to lay out for you why I think that Mr. Melendez-Diaz should be found not guilty in this case.

But first I'm going to remind you, I want to remind you that, of course, at the end of the arguments, my statements and conclusions, Mr. Freeman's statements, the judge will tell you what the law is, and that is particularly important in a criminal case, not only because the definitions of the crimes come in but also because there are principles that are to be followed that are peculiar to criminal cases and some of the principles that are peculiar to criminal cases are simply to ensure that whoever comes into court who is charged with a crime is given as fair a shot as possible.

You've seen some of the rules that we have when we asked you questions. You may have come to side bar, the judge asked you a question, can you be fair in this case, would you give more [15] credibility to a police officer or would you hold it against the defendant that he didn't testify, that kind of thing. We want to know, do you know anybody in the courtroom, me or Mr. Rodriguez or Mr. Freeman, or have you heard of any of these police officers because we want people who don't know anything about the case, who come in and judge it without any preconceptions at all.

One of the principles that governs criminal cases is that anyone who is charged with a crime has a right to remain silent. They don't have to offer any evidence. They don't have to do anything and actually, once you get over that hoop in your mind, it makes it a little bit easier because all you have got to do is think about, in the case that was presented by Mr. Freeman, does that convince me. Forget about

everything else, look at it, what was presented by the Commonwealth, does that convince me that these fellows are guilty.

Another rule that may be a little unusual but I'm sure you've heard of it, the proof has to be beyond a reasonable doubt. In conjunction with that also, anybody who comes in [16] here as a defendant is presumed to be innocent and let me suggest to you that just in the common sense sort of way, that means that the scales are actually weighted in favor of the defendant when he comes in here, he or she, they're presumed to be innocent, and at some point you hear enough evidence to where you say, well, you know, maybe they did do that, you know, I'm not really sure but that's possible, but that's not enough because that's not proof beyond a reasonable doubt. Maybe you hear some more evidence and you say, well, you know, I think that that's probable, but that's not enough because that's not proof beyond a reasonable doubt.

I'm not smart enough to repeat for you what the definition of proof beyond a reasonable doubt is but it's more than a probability, more than a strong probability. That's what you have to find.

Each case, whether it's a murder case you see on television or some big case that you read about in the newspapers, is governed by these principles and you're not going to be interviewed by the press, this is not a big case [17] that you can go on Oprah and be a celebrity for the rest of your life for hearing this case. Let me suggest to you that your job is the same as the people who sit on those cases. It is to take those principles, apply them to the facts, and come up with a decision, a decision based on those principles, not on your prejudice, not on your preconceptions, but on

the law as it is given to you and the facts that you find beyond a reasonable doubt.

So let me suggest to you how to look at the facts in this case. Once again, focusing on the Commonwealth's case, one charge is distribution, simply, as the officer said on the stand, a sale, just somebody hands somebody the drugs and usually gets money in return, but that's distribution, drugs are changing hands.

And what is the Commonwealth's evidence that that happened? Well, the Commonwealth has a police officer. He testified that he sees three people in the car, one guy gets in the car, he leans forward. That's it. He leans forward. Certainly that doesn't tell you anything. Doesn't tell you whether the guy was giving him [18] the secret to winning the Megabucks, whether he was paying him for a ticket to a ball game. What happened in that car, that tells you nothing. No proof of distribution there.

So perhaps there's some circumstantial evidence that would lead you to believe that these fellows were distributing as opposed to the third party, and the Commonwealth would have you believe, well, you know, there's drugs that were kicked around in the back seat. Well, think about the evidence, please. Think about what the police officers testified to. Two guys are arrested based on this fellow leaning forward in the car. Two guys are arrested. They're put in the back seat of a cruiser and they drive around to pick up number three guy. Number three guy is standing on the sidewalk. Officer Anderson and Officer Ryan, both testified that they got out of the car and walked around to where the detective had Mr. Wright on the sidewalk. Then they put him in the car.

Now, what the Commonwealth would have you believe is, here are these two guys and they're secreting this pile of drugs, the police [19] are out of the car, they're sitting there in the cruiser, and what do they say to each other? Let's wait until the police get back in the car before we do something with these drugs? Let's wait until the police are sitting in the front seat and then let's kick the front seat?

Does that sound right to you? Does that sound reasonable? Does the kicking start in the front seat when the police first get in the cruiser? It starts after, only after Mr. Wright gets in the car, only after Mr. Wright enters the car and the police car starts driving the five-minute drive to the police station and only halfway through that drive do the police officers say that they feel or see this movement. Officer Anderson, he says he sees the defendants here in the car. Officer Ryan is much more adamant about, he sees them practically jumping around in the back seat.

Well, let me suggest to you that between the three of them, some drugs hit the floor, probably the drugs that were found that day, they hit the floor. Where those drugs came from, let me suggest to you, has not been proven, [20] has not been proven. What you do know is that Mr. Wright, the fellow whose office was never searched, the fellow whose clothing was never gone under, only after he gets in the car did this secreting of drugs take place.

Well, there's three hundred and twenty dollars. So several stories on the three hundred and twenty dollars. One is Officer Ryan takes the two fellows out of the back seat of the cruiser and doesn't notice three hundred and twenty dollars came from the cruiser. Somebody had it in their hand, somebody

kicked it out of the car. Somebody slid across the seat on it. Right there, here's the trained police officer, no doubt alert, who's taking two guys out of the car and, bam, doesn't notice them, not found until later. Officer Anderson, on the other hand, says Ryan and Detective Pieroway took both of them out of the car. By his account now there's two police officers, one a drug detective, who don't see this three hundred and twenty dollars.

The first time Detective Pieroway sees it, he says it just looked like a lot of money. [21] Well, let me ask you, would you expect to see a lot of money? Remember, I asked the police officer, was there a money clip on there? Was there something holding that money? No, it's just folded. Well, hold up three hundred and twenty dollars, drop it on the ground. I'll bet there's not one place in Boston you could do that and it not be noticed except for the police parking lot that day.

Why does Detective Pieroway say that the drugs are found on the seat, doesn't put that in his police report? Contrary to what the other officer says. Well, let me suggest to you that perhaps there was a little bit of a leap to a conclusion when Detective Pieroway saw the first leaning forward in the car as to who was doing what and who wasn't doing what, and Detective Pieroway decided that this fellow who worked, whom you can see a picture of him there, white guy with a beard, he apparently worked at the K-Mart, that he can't be the dealer.

Well, was there anything about the car that shows that these guys were the ones who were dealing? Did you check the car? Did you find [22] any secret compartments? Did you find anything that indicates that these guys were drug dealers? No. In fact, we did

check the car, we didn't find anything. Did you check the phone records at the K-Mart to see where Mr. Wright was calling, who he was calling? No. Did you go back to search Mr. Wright's office? No. Did anybody search Mr. Wright's clothing? No.

If there was a blue car involved in other incidents on previous days, wasn't that on camera? Well, if you look at the pictures, we got pictures from November 15. We got no pictures of any blue car any other time. Detective Pieroway, let me suggest to you, perhaps jumped to a conclusion about who was doing what that day.

So that's your distribution case, a distribution case based on the fact that there's this leaning forward in the car, that everybody waits until all the police are in the car before they start kicking things around, and that it might be these two fellows who were kicking it around, despite the fact that nothing was happening before Wright got in the car and the [23] money dropping on the ground and no one notices it.

And the trafficking case, the trafficking case, the judge will instruct you, requires, among other things, possession again of a certain amount of drugs and the amount of drugs isn't in question. What is in question is who possessed those drugs. Who do you think possessed those drugs? Once again, look at the facts that I just outlined to you or the testimony I just outlined to you and if that comports with your memory of it, then ask yourself, is it Mr. Wright who has the drugs? Is it Mr. Melendez-Diaz who has the drugs?

Let me suggest to you, even in what's called a joint venture, people are working together, being in the same room with someone who has drugs is not

possessing those drugs. If it's illegal to carry this pen and I'm in a car with you and I drop the pen and step away, who's got possession of that pen? Me? You? Well, if you can't determine beyond a reasonable doubt, not just a probability, but beyond a reasonable doubt that these guys possessed that, the drugs that [24] day, then you cannot find them guilty of trafficking.

So just to sum up here, when you go back to the jury room, think about those things, but, more importantly, listen to the judge, think about the principles to be applied to how to evaluate those facts because if you go back in the jury room and you decide, you know what, something was going on that day, you know what it was, something illegal going on, but we just can't tell who was doing what with what to or with whom because we've got three people and two defendants and evidence that points in all different directions, and if that, ladies and gentlemen, leads you to the conclusion that there is a reasonable doubt that you find, then it is your duty, it is your duty to find Mr. Melendez-Diaz not guilty of these crimes.

Thank you. Thank you, Your Honor.

* * * *

[35] MR. FREEMAN: Thank you, Your Honor. Thank you, ladies and gentlemen, for your attention and for your patience over these last several days.

Now, at the outset I had an opportunity [36] to give you an opening statement and to preview what it was that the Commonwealth intended to show you during the course of the trial and, as I explained then, this is our opportunity to come before you and to argue our respective positions. You will recall at the outset, I

asked you to do three things, to keep your ears open, to keep your eyes open, and keep an open mind.

You've just heard two very good closing arguments from Mr. Moss and Mr. Rodriguez and the point that both seem to be making is that no one saw drugs be distributed from either Mr. Montero or Mr. Melendez-Diaz to Mr. Wright and no one saw either Mr. Melendez-Diaz or Mr. Montero get rid of the drugs in the back of the cruiser and, in fact, Mr. Rodriguez in his closing pointed out that what we have here is just assumptions by one of the detectives. Both Mr. Moss and Mr. Rodriguez reminded you about the standard that's to be applied here, that it's the Commonwealth's obligation to prove this case to you, to your collective satisfaction, and you must be satisfied beyond a reasonable doubt, not any doubt, but a reasonable doubt.

[37] And the judge is going to give you jury instructions when I'm through as to that and various other items including two items that were mentioned in the defendants' closing, circumstantial evidence and another phrase for you, joint venture. Both of those, circumstantial evidence and joint venture, well, they're subject to definition but they are a little bit like they sound. Circumstantial evidence, circumstances, joint venture, requiring two people. I only mention that because I will be referring to them, those two phrases, in my closing.

You have a tool with you that I want to mention briefly. You're going to go back at the conclusion of this case and you are going to deliberate. To assist you in your deliberations, you have a powerful tool. That's common sense, your God given common sense. You had it when you walked into the courtroom, you'll have it when you walk out at the conclusion of

this case. You use it everyday when you evaluate facts and circumstances and individuals. Don't abandon that common sense. Use it. It's a valuable [38] tool.

What both Mr. Rodriguez and Mr. Moss have indicated here is that there is really not enough for you to work with. What we have here is, if you will, a series of coincidences. On November—well, before I do that, before I go to that, were far apart, if you will, as to many things in this case. However, I believe Mr. Moss touched on one or two things that, yes, the Commonwealth and the defendants are not very far apart on. The Commonwealth still bears the obligation to prove these facts to you but we're closer, the parties are closer together on these than on some other issues.

What are those issues? The date and the location, November 15, 2002, the location, K-Mart on All-state Road in South Boston, Area C-6 Boston Police station. Who was present? Well, we have Mr. Montero and Mr. Melendez-Diaz as those were the two people in the blue four-door Mercury Sable that pulled up in front of the K-Mart on that day. Four plastic bags were recovered from Mr. Wright. They're cocaine, analyzed as such. Nineteen plastic bags taken [39] from the back of the police cruiser at the Area C-6 station, that's cocaine weighing twenty-two point one six grams. Photos, several photos were taken of the parking lot and specifically the Mercury Sable.

So where does it all fall down? Where are the parties far apart? Where did Thomas Wright get those four plastic bags of cocaine and who had the nineteen plastic bags of cocaine that the officer found in the back of the cruiser? Those are the questions.

It's your memory of the testimony that controls in this case, not what I say, not what defense counsel say. It's your collective memory that controls but I do want to touch on the testimony of the witnesses who came up here.

Robert Impega, back in November of 2000, worked for the K-Mart in loss prevention. On November 15, 2001, he observed Thomas Wright, as he had before, out in the front area, get a phone call, head out to the front, wait as if he were waiting for a blue car, a blue car that Impega had seen Wright meet before. Again, Wright did the same thing that he had done [40] before: Goes out, he meets with the blue car, travels a short distance, gets out and comes back in that store.

November 15, this time when Wright gets the call, Impega calls Pieroway, gets him down, provides a description of Wright, provides a description of a car. Pieroway sees Wright come out, wait, nobody there, go back in. What happens then? The blue car shows up and what does the guy behind the wheel, Mr. Ellis Montero, do? He is on a cell phone, drives right by Pieroway on the cell phone. What does Impega say is going on in the interior of the mall? Wright got a phone call. What does Wright do when he gets this phone call? He comes back out. The blue Sable has looped around, picks up Wright, drives right past Pieroway, Pieroway says he's seeing into the passenger compartment. Wright is leaning over the front seat. He can't see what they're doing but Wright's head is turning back and forth.

A short distance, Wright gets out, goes back to the store. The car continues on. Pieroway goes, stops Wright, searches Wright, [41] recovers four plastic bags of cocaine, estimated value approximately eighty dollars a piece, could be up to a hundred. If

you're a good customer, a repeat customer, maybe you get them for eighty dollars apiece. Remember that number.

The photograph that Detective Pieroway talked about shows Mr. Wright inside the blue Sable. This particular photograph, the driver appears to be looking down at his lap. Why would the driver, why would Mr. Montero be looking down at his lap? Maybe he's looking at his phone. Maybe he's looking at his watch. Who knows. The marked units stop the blue Sable, bring the driver, Mr. Ellis Montero, bring the passenger, Mr. Luiz Melendez Diaz back in the cruiser to K-Mart.

What happens before those two gentlemen go into the cruiser is significant. Pat frisked, it's a search for weapons, not drugs. Officer Anderson said he searched his prisoner, Mr. Melendez-Diaz, cuffed him behind the back, and put him on the passenger side of the cruiser. Officer Ryan did the same, quick pat frisk. I asked him how quick? Seven seconds? Yeah. [42] That's a pretty quick search, quick enough to ascertain if someone has got a gun, a knife, something that's going to hurt you, not very thorough. Cuffs Mr. Montero, puts him in the back of the cruiser.

Short distance from that location to K-Mart. At that location Mr. Wright is put in the car. Now, Mr. Wright has been searched by Officer Pieroway. You heard the details of his search and how he conducts searches. Collar, outer clothing, waistband, pockets, legs, down to the socks and shoes. That was a search for evidence. Detective Pieroway said that he got the cocaine from the pockets of Mr. Wright. He wanted to make sure that there was no more cocaine on his person. That's why he did a thorough search of that

individual, Wright. Cuffed behind as Mr. Montero and Mr. Melendez-Diaz, all three of those individuals are now in the cruiser.

The orientation of each one of these individuals is significant. From the passenger side to the driver's side, you have got Mr. Montero—excuse me, you have got Mr. Wright [43] behind Officer Anderson, Mr. Melendez-Diaz and Mr. Montero. Your memory controls.

You have a car that was taken out in the morning by these two officers. They did their Form 25, they inspected the car. There was nothing in it. The only people who had been in the back seat of that car on November 15, 2001 from the period of seven thirty in the morning when they got the car to three o'clock in the afternoon when these gentlemen went into the car were those three individuals.

Now, those three individuals were transported from K-Mart to Area C-6. There was movement in the back seat. Officer Anderson, Officer Ryan testified to that movement. Was there any movement from Mr. Wright? No, not according to Anderson and he's seated right in front of him, turning around, looking in the back seat. What did Ryan say? Yeah, I think actually that guy was crying during the transport. How about the other two guys, Mr. Melendez-Diaz and Mr. Montero? There was movement from them, they're leaning forward, they're twisting, side by side, there's kicking of the partition between [44] the back seat and the front seat.

Remember the description of that seat? It's solid molded plastic from the rear window all the way down to the floor. There's a hard metal part in the back seat, plexiglass up above. So you can see in the

back there's a small area where you can place your feet, kicking the back seat. What did Officer Ryan say? I felt it in my buttocks, somebody was kicking the seat behind me. Officer Anderson, I didn't feel anything. What does that indicate to you? The kicking came from the driver's side, not from the passenger's side.

You get to Area C-6, the car parks in the parking lot right next to the steps. Officer Anderson takes Mr. Wright out. Officer Ryan takes out Mr. Melendez-Diaz—excuse me, Mr. Montero, Mr. Melendez-Diaz, Officer Pieroway helps. Who is the first up the stairs and into the area of C-6 booking area? It's Wright and Anderson. Anderson says, I put Wright into the holding cell and I went back outside. Why? Because there was all that jumping around, movement going on, I wanted to doublecheck. He [45] gets outside, down the stairs, immediately sees cash on the ground by the rear driver's door. Gets down, looks in. That's where he sees the plastic bag with the nineteen plastic bags.

Now, you heard from Detective Pieroway who introduced this evidence, these plastic bags. Many of them have been opened during the process of testing so these are not necessarily in the exact same form that they were when they were seized. I would submit to you that you should look at them about whether or not they would be bigger or smaller in size when they were recovered on November 14, 2004—excuse me, 2001. Officer Anderson said he recovered them from the driver's side of the cruiser somewhat under the seat in that little area where you put your feet.

Now, at the booking we have two cell phones and approximately three hundred dollars in cash being

taken from Mr. Montero. We have a pager and approximately a hundred and seventy-five dollars taken from Mr. Melendez-Diaz. Mr. Montero was seen on the phone at the outset so those are the coincidences that lead us here [46] today, but I would ask you to look closely at those coincidences as Mr. Moss and Mr. Rodriguez have asked you to do. A coincidence that Mr. Wright, doing the same type of activity from twelve-ish to four-ish in the afternoon, meeting the same car on November 15, 2001, meets this car, travels a short distance that's observed by the officer, gets out, has four plastic bags of cocaine on his person? They bring the driver and the passenger of that car back and transport them to the station.

Now, Mr. Moss wanted to point out, wait a minute, if they had these drugs on them, why wouldn't they have done it when the officers were out of the cruiser. Let's think about that for a second. If they are the only two people in the car and they're going back to the station, one of them has the drugs, the other one does not, reasonable assumption, so if one of them disposes of the drugs, that means they're both going to get blamed for it because they are the only two people in the car. Better that I hold onto the drugs and I take responsibility for it, but, wait, there's a third option now. We have the [47] buyer being introduced into the back seat of the car. There's a possibility the police will think that the drugs were his.

And Mr. Rodriguez was quite correct. Their hands are behind their back. How do you sit to get something out of your own pocket when your hands are behind your back? Would you need the assistance of somebody sitting next to you? And isn't that what

happened when the parties, Mr. Montero and Mr. Melendez-Diaz, were leaning away from each other or leaning forward? They were assisting each other. Either one was assisting the other in getting the drugs out and into the cruiser to lay it on Mr. Wright.

Well, what about Mr. Wright? He could have had the drugs except for the fact that he was the one who was thoroughly searched by Detective Pieroway and if you go with that theory, if the cash follows the drugs, the three hundred and twenty dollars, otherwise why else wouldn't all the money have been thrown out of the car? If the three hundred and twenty dollars goes with the drugs, why was it found on the driver's side where these two gentlemen exited [48] and not on the passenger's side where Mr. Wright exited?

The money in and of itself is not damming unless you look at the price tag, four eighty dollar bags adds up to three hundred and twenty dollars. Isn't that a convenient amount to have outside the cruiser? Another coincidence. The officers testified that when they were removing these individuals from their car, their focus was on the prisoners, not on their hands, not on their feet.

Mr. Rodriguez focused a great deal of time in his closing on how an individual would get out of the car. I believe Officer Ryan testified that he assisted the individual from the front out of the car, your memory controls, not mine. If you're facing the front of the individual, how do you know what's going on behind? Hands him off, gets the second one out. His testimony was, I wasn't focused on the ground or what's going on in the car. I was focused on the prisoners that I had that were my responsibility. I had to get them

into the station to be booked. That's what I was focused [49] on.

How much time elapsed between the prisoners getting out of the car and Officer Anderson coming back out? Minutes. Approximately three, maybe four minutes to get in, to get his prisoner into the holding cell, and back out. Who was in the lot while all this was going on, Officer Anderson? There were other cruisers parked out there but I didn't see any other police officers and I didn't see any civilians. Again, the car that they picked up at seven thirty in the morning and had to sign for, no one was in the back seat of it until these two gentlemen and Mr. Thomas Wright.

These nineteen plastic bags have cocaine. They look approximately the same size, knotted in the same way, packaged in the same way, similar to the packaging and size of these four plastic bags. Reasonable assumption that those four came from these nineteen. The amount of money found on the ground, consistent with the amount of money one would pay for four eighty dollar bags from this stash of drugs.

Again what is Mr. Montero doing as [50] he's driving around in his car with Mr. Wright in his back seat, as he's looking in his lap? This is all, the defendants would suggest, coincidence. Well, ladies and gentlemen, if you pile coincidence on top of coincidence on top of coincidence, that is no longer coincidence, that is evidence, circumstantial evidence that these gentlemen distributed four plastic bags of cocaine from this stash to Mr. Wright, that upon being arrested and transported back, they said, we got to get rid of the stuff, one of them had the drugs, the other one needed to assist him in leaning forward

to get the drugs off of his person and onto the floor of that car.

They had to work together to get that cocaine off one of their bodies and onto the floor of that car so it couldn't be connected back to them. Joint venture, just the same way, that one or more sold those drugs, assisted in dealing those drugs to Thomas Wright, they worked as a team on November 15, 2001.

When you consider all the evidence, all the circumstantial evidence, you will come to the conclusion that these two individuals were joint [51] venturers here in the distribution of cocaine to Thomas Wright and in the trafficking of the cocaine that was found on the floor of the cruiser at Area C-6 Thank you.

* * * *

[65] What is it that the Commonwealth has to do to prove a defendant guilty of the crime of trafficking in cocaine? There are five elements, five. Each must be proven beyond a reasonable doubt. I'm going to list them first and then I'm going to go back and give you a little more detail on each one.

The first element the Commonwealth must prove beyond a reasonable doubt is that a defendant possessed, a defendant possessed a certain substance; second, that that substance was a controlled substance, namely, that it was cocaine; third, that a defendant possessed that cocaine knowingly or intentionally; fourth, that a defendant had the specific intent to distribute that cocaine; and, fifth, that the amount of the cocaine in net weight was fourteen grams or more.

* * * *

[68] The second element that the Commonwealth must prove beyond a reasonable doubt is that the substance the defendant possessed was a controlled substance. In this case the [69] allegation is that it was cocaine which is a Class B controlled substance under our state law and I'm telling you it is a controlled substance under our state laws. So the Commonwealth must prove to you that the substance that the defendant allegedly possessed was, in fact, cocaine. There is no requirement that the cocaine be in pure form. Any mixture will suffice.

In considering this element, you may consider all the relevant evidence you had in the case about what that substance was. In particular, you have a certificate of analysis which was marked as an exhibit. That is evidence for your consideration and you should consider that together with all other evidence in deciding whether or not the Commonwealth has met its burden of proving that this was, in fact, cocaine. So from that certificate of analysis you're permitted but you're not required to conclude that the substance was cocaine. It is entirely up to you to decide.

* * * *

[74] Now, in conjunction with the trafficking in cocaine as well as the distribution of the Class B controlled substance charge, the Commonwealth has proceeded against these defendants on a theory of joint venture and essentially what that means is that the defendant joined with one or more other persons to commit the crime and a person who may be found guilty or—I'm sorry. A person may be found guilty of an offense under a theory of joint venture even if he did not personally do the act but instead assisted or

abetted one or more other persons in the commission of the crime.

So, in conjunction with the evidence on trafficking in cocaine as well as distribution, you need to understand what this theory of joint venture is. It requires proof by the Commonwealth of three elements. Each one must be proven beyond a reasonable doubt.

[75] The first element requires that a defendant was present at the scene of a crime; two, that a defendant had knowledge that another person intended to commit the crime and shared that intent himself; and, three, that a defendant aided or assisted in the commission of a crime or that, by agreement, was willing and available to assist the other person in carrying out the crime, if necessary. So in a joint venture, a person is guilty if he intentionally participated with another in the commission of a crime as something he or she wished to bring about and actively participated in causing that criminal venture or crime to succeed.

* * * *

[79] Alright. Finally, let me just explain to you what we mean by the crime of distribution of a Class B controlled substance. Each defendant is accused of distributing to a third person by the name of Thomas Wright a substance, [80] a Class B controlled substance, to-wit, cocaine. So what is it that the Commonwealth has to do to prove a defendant's guilt on this crime?

Three elements. Again, I'll list them and then give you more detail. The three elements, in summary, are as follows: one, that the substance in question is a controlled substance that was distributed; two, that a

defendant distributed some perceptible amount of that substance to another person, in this case, Thomas Wright; and three, that a defendant did knowingly or intentionally distribute that cocaine.

And just let me flesh each one of these out for you. The first element requires proof beyond a reasonable doubt that the substance the defendant allegedly distributed was cocaine and I explained to you that it is a controlled substance. I refer again to the certificate of analysis for your review, keeping in mind that you are permitted but not required to conclude that it was cocaine based on that certificate and any mixture of cocaine will suffice for distribution. It doesn't have to be in pure [81] form.

* * * *

# PETITIONER'S BRIEF

96

(7)

No. 07-591

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IN THE
# Supreme Court of the United States

Luis E. Melendez-Diaz,
*Petitioner,*

v.

Massachusetts
*Respondent*

On Writ of Certiorari
to the Appeals Court of Massachusetts

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).

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## BRIEF FOR PETITIONER

## OPINION BELOW

The memorandum and order of the Appeals Court of Massachusetts (Pet. App. 1a-10a) is reported at 69 Mass. App. Ct. 1114, 870 N.E.2d 676, and is unpublished. The order of the Massachusetts Supreme Judicial Court denying review (Pet. App. 11a) is reported at 449 Mass. 1113, 874 N.E.2d 407. The relevant trial court orders are unpublished and appear at J.A. 29 and 32.

## JURISDICTION

The Massachusetts Supreme Judicial Court denied review of this case on September 26, 2007. Pet. App. 11a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Chapter 111 of the General Laws of Massachusetts provides in relevant part:

> **§ 12. Analyses of narcotic drugs, poison, drugs, medicines, or chemicals.** The department [of public health] shall make, free of charge, a chemical analysis of any narcotic drug, or any synthetic substitute for the same, or any

preparation containing the same, or any salt or compound thereof, and of any poison, drug, medicine or chemical, when submitted to it by police authorities or by such incorporated charitable organizations in the commonwealth, as the department shall approve for this purpose; provided, that it is satisfied that the analysis is to be used for the enforcement of law.

**§ 13. Certificate of result of analysis of narcotic drugs, poisons, drugs, medicines, or chemicals; evidence.** The analyst or an assistant analyst of the department [of public health] . . . shall upon request furnish a signed certificate, on oath, of the result of the analysis provided for in the preceding section to any police officer or any agent of such incorporated charitable organization, and the presentation of such certificate to the court by any police officer or agent of any such organization shall be prima facie evidence that all the requirements and provisions of the preceding section have been complied with. This certificate shall be sworn to before a justice of the peace or notary public, and the jurat shall contain a statement that the subscriber is the analyst or an assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and net weight of the narcotic or other drug, poison, medicine, or chemical analyzed or the net weight of any mixture containing the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or assistant analyst, and of the fact that he is such.

## INTRODUCTION

Until quite recently, this Court and others generally assumed that the Sixth Amendment required the prosecution, absent a stipulation from a defendant, to present the findings of forensic examiners through live testimony at trial. *See, e.g.*, *United States v. Wade*, 388 U.S. 218, 227-28 (1967) (forensic analyses of fingerprints, blood and hair samples, etc.); *Diaz v. United States*, 223 U.S. 442, 450 (1912) (autopsy reports); *State v. Henderson*, 554 S.W.2d 117, 120 (Tenn. 1977) (surveying lower courts). However, following this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), which conflated the Confrontation Clause with hearsay law, many states began to exempt crime laboratory reports from the reach of the Sixth Amendment by labeling them as "business records" or "public records." *See* Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 508 & n.165 (2006). Even in jurisdictions that resisted characterizing crime laboratory reports as business or public records, many legislatures enacted—and courts condoned—laws specifically making such reports admissible in the prosecution's cases-in-chief in lieu of live testimony. *See id.* at 478 & n.9.

This departure from traditional practice raised a serious constitutional question even during the *Roberts* era. *See, e.g.*, Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L.J. 671, 674-75 (1988). But in the wake of this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), prosecutorial use of forensic laboratory reports in lieu of live testimony has become even less constitutionally

defensible. *Crawford* returned the Confrontation Clause to its traditional mode of operation—that is, to a procedural provision that forbids the government from introducing "testimonial" hearsay in place of live testimony at trial. A classic form of testimonial hearsay is an *ex parte* affidavit, *id.* at 43-49, and modern forensic laboratory certificates are the functional equivalent of such affidavits. The Appeals Court of Massachusetts, following a binding decision from the Massachusetts Supreme Judicial Court, nonetheless held in this case that such certificates are not testimonial.

## STATEMENT

1. Massachusetts law requires a forensic analyst, upon a police officer's representation "that the analysis is to be used for the enforcement of law," to test seized evidence for the presence of illegal drugs or other chemicals. Mass. Gen. Laws ch. 111, § 12. The forensic analyst does not need to test all specimens that are part of a group from a common source; "[i]t is enough to make representative tests." *Commonwealth v. Shea*, 545 N.E.2d 1185, 1189 (Mass. App. Ct. 1989). Once testing is complete, Massachusetts law requires the forensic analyst, upon a police officer's request, to recount the results of his examination on a "signed certificate, on oath" and to furnish the certificate to the officer. Mass. Gen. Laws ch. 111, § 13.

Massachusetts, like several other states, allows prosecutors to introduce such forensic analysts' certifications as substitutes for live testimony at trial. Specifically, a Massachusetts statute directs courts to admit sworn crime laboratory reports as "prima facie

evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed or the net weight of any mixture containing the narcotic . . . or chemical analyzed." *Id., see also* Mass. Gen. Laws ch. 22C, § 39 (providing same when police department, rather than the health department, performs a chemical analysis). "The purpose of [this statute] is to reduce court delays and the inconvenience of having the analyst called as a witness in each case." *Commonwealth v. Verde*, 827 N.E.2d 701, 704 n.1 (Mass. 2005). Accordingly, prosecutors need not call as witnesses the forensic analysts who prepare these reports, even if defendants request that they do so.

2. In November of 2001, the loss prevention manager of a Boston-area K-Mart called the police to report the suspicious activities of a store employee, Thomas Wright. According to the manager, Wright would sometimes leave the store, take short rides in a blue sedan, and return about ten minutes later.

The police came to the store shortly after receiving the manager's call. Upon arriving, they observed Ellis Montero drive up in a blue sedan, with Petitioner Luis Melendez-Diaz riding in the front passenger seat. Wright got into the back seat of the sedan, and the three men drove forward a short distance and stopped. Looking through the car's back window, the officer observing the suspects saw Wright lean forward and then back. The officer never noticed any hand movements or anything else indicating that any kind of exchange had taken place between the car's occupants. Nevertheless, when Wright got out of the car and began walking towards K-Mart, the officer

stopped and searched him. The officer found four small bags in Wright's front pocket. Two of the bags contained white powder, and two contained light yellow powder with small clumps. Suspecting that a drug transaction had just taken place, the officer arrested Wright and radioed to the other officers on the scene, who arrested Montero and petitioner.

Officers then drove Wright, Montero, and petitioner to the police station. While the three men were being booked, the officers inspected the police cruiser that had transported them to the police station. In the back seat, they found nineteen plastic bags containing dark yellow powder with large clumps.

The police officers submitted the plastic bags from Wright's pocket and from the back seat of the cruiser to the Massachusetts Department of Public Health's State Laboratory Institute for testing. Although this laboratory is "not currently accredited by an[y] external certification body" for purposes of forensic testing,[1] it is an entity to which the Boston Police Department regularly turns for chemical analyses of suspected drugs. J.A. 27. Approximately two weeks later, two state-employed analysts issued three sworn reports on letterhead from the Massachusetts Department of Public Health. The first two reports assert that the four bags taken from Wright

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[1] *See* Letter of Julianne Nassif, Director, Division of Analytical Chemistry, Executive Office of Health and Human Services, Massachusetts Department of Public Health, to David J. Nathanson, Esq. (May 30, 2008) (produced in response to state freedom of information request and reproduced as an Appendix to this brief); *see also Laboratories Accredited by ASCLD/LAB*, http://www.ascld-lab.org/legacy/aslablegacylaboratories.html (listing nationwide accreditations as of May 19, 2008).

contained a total of 4.75 grams of a substance containing cocaine. Pet. App. 24a-27a. The third report asserts that the nineteen bags found in the police cruiser contained 22.16 grams of a substance containing cocaine. Pet. App. 28a-29a.

The reports, which are reproduced at Pet. App. 24a-29a, are largely conclusory. They do not describe the qualifications or experience of the analysts who conducted the testing. They do not indicate whether any recordkeeping or storage measures had been taken to preserve the integrity of the items for testing. They do not identify the testing method the analysts used to arrive at their conclusions or describe any difficulties (and accompanying error rates) associated with the particular method(s) the analysts used to test for cocaine. Nor do the reports specify the percentages of cocaine allegedly present in the substances tested or otherwise address the differences in the samples that account for why some of the bags contain white powder and others contain dark yellow solids. The reports do, however, provide what the Commonwealth needed to prosecute a criminal case against petitioner: declarations from state forensic analysts that the packages seized in connection with petitioner's arrest weighed over fourteen grams and all contained cocaine.

3. The Commonwealth charged petitioner with distributing cocaine and with trafficking in cocaine in an amount between fourteen and twenty-eight grams. *See* Mass. Gen. Laws ch. 94C, §§ 32A & 32E(b)(1). Petitioner refused to stipulate to the authenticity of the Commonwealth's drug analyses or to any other facts, J.A. 7-8, and demanded a trial.

At trial, the prosecution offered the laboratory reports during a police officer's testimony as proof that the four bags recovered from Wright and the nineteen bags found in the police cruiser contained, respectively, 4.75 and 22.16 grams of substances containing cocaine. J.A. 30, 32. Petitioner objected and specifically cited *Crawford v. Washington*, 541 U.S. 36 (2004), to signal that introducing these reports without also calling to the stand the analysts who prepared them would violate his Sixth Amendment right to confrontation. J.A. 29, 32. The trial court overruled the objections without explanation and admitted the reports into evidence. *Id.* The Commonwealth never called the state forensic examiners to the stand or asserted that they were unavailable to testify.

The officers involved in the case also testified that they thought the substance in the bags at issue "appeared to be cocaine." J.A. 23; *see also* J.A., 18, 19, 26, 33. But the lead officer acknowledged on cross-examination that he did not "have any real knowledge of what [was in the bags] except what came back from the lab" in the certificates. J.A. 35. And the district attorney emphasized in his closing that the bags the police had seized contained "cocaine, *analyzed as such.*" J.A. 50 (emphasis added).

After being instructed that the laboratory reports alone permitted it to conclude that the bags the officers seized contained cocaine, J.A. 59, the jury found petitioner guilty on both counts.[2] The court sentenced

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[2] The two relevant jury instructions stated in relevant part: (1) "In considering this element [whether the evidence at issue contains cocaine], you may consider all the relevant evidence you had in the case about what the substance was. In particular, you

him to three years in prison, the mandatory minimum for trafficking in over 14 grams of substances containing cocaine, and to three years' probation.

4. The Appeals Court of Massachusetts affirmed. As is relevant here, the appellate court rejected petitioner's *Crawford* argument on the basis of the Massachusetts Supreme Judicial Court's prior holding in *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005), that introducing "certificates of drug analysis" in lieu of live testimony does not "deny a defendant the right of confrontation." Pet. App. 8a n.3. The *Verde* decision, which is reproduced at Pet. App. 12a-23a, reasoned that a drug analysis certificate is "akin to a business or official record, which the Court [in *Crawford*] stated was not testimonial in nature." Pet. App. 18a. The Massachusetts Supreme Judicial Court further took comfort in the assertion that drug analysis certificates "are neither discretionary nor based on opinion," but rather are a product of a "well-recognized scientific test." Pet. App. 17a.

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have a certificate of analysis that was marked as an exhibit. That is evidence for your consideration and you should consider that together with all other evidence in deciding whether or not the Commonwealth has met its burden of proving that this was, in fact, cocaine. *So from that certificate of analysis you're permitted but you're not required to conclude the substance was cocaine.* It's entirely up to you to decide." J.A. 59 (emphasis added). (2) "The first element requires proof beyond a reasonable doubt that the substance the defendant allegedly distributed was cocaine and I explained to you that is a controlled substance. I refer again to the certificate of analysis for your review, keeping in mind that you are permitted but not required to conclude that it was cocaine based on that certificate . . . ." J.A. 61.

The Appeals Court further held that "[b]ased on all the evidence, *including the drug analysis certificates concerning the substances taken from Wright and the back of the cruiser*," there was sufficient evidence to support petitioner's convictions. Pet. App. 8a (emphasis added).

5. Petitioner sought discretionary review of this decision in the Massachusetts Supreme Judicial Court. He claimed, among other things, that the introduction of the drug analysis certificate violated the Confrontation Clause. Specifically, petitioner argued that "*Verde* is contrary to the holding in *Crawford* and the United States Supreme Court's post-*Verde* decision in *Davis v. Washington* because the primary purpose of the analyses was to produce evidence for use in a criminal prosecution." Petr. Br. for Further Appellate Review in Mass. S.J.C. at 15-16. The Massachusetts Supreme Judicial Court denied review without comment. Pet. App. 11a.

## SUMMARY OF ARGUMENT

A. A state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence and, therefore, subject to the Confrontation Clause. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court observed that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50; *see also Mattox v. United States*, 156 U.S. 237, 242 (1895) (clause intended to prohibit "*ex parte* affidavits" in place of live testimony). This Court further has

explained that statements gathered by police officers "are testimonial when the circumstances objectively indicate . . . that the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

State forensic examiners' crime laboratory reports fall squarely within this class. Forensic examiners in Massachusetts, as elsewhere, create such reports at the behest of police officers "for the enforcement of law." Mass Gen. Laws ch. 111, § 12. The reports are formal, sworn statements. And prosecutors forthrightly offer them in lieu of live testimony at trial. Forensic laboratory reports are thus the modern equivalent of *ex parte* affidavits – exactly the kind of "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact" that this Court has characterized as quintessentially testimonial. *Crawford*, 541 U.S. at 51 (quotation and citation omitted).

B. Neither characterizing a forensic report as "akin to a business or official record" (Pet. App. 18a) nor as a declaration of objective fact (Pet. App. 17a) undermines its testimonial nature. It is immaterial under the Confrontation Clause whether a piece of hearsay evidence can be classified under any particular modern hearsay exception. While *Crawford* noted that records that were admissible under the common-law "shop book" rule were nontestimonial in nature, shop books were not prepared with an eye toward criminal investigations or potential litigation. Forensic reports, by contrast, are expressly prepared for law enforcement to aid in criminal investigations.

As such, and as courts recognized prior to this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), forensic certifications are fundamentally testimonial in a way that classic business and official records were not.

The Confrontation Clause also applies with the same force to statements that are factual in nature as it does to statements of opinion. Even if factual or objective statements are more likely to be reliable, *Crawford* expressly rejected reliability as a basis for exempting testimonial hearsay from the adversarial process. In any event, the Massachusetts' courts' supposition that forensic reports are purely objective is mistaken. Such reports reflect complicated, subjective interpretations of imprecise scientific tests. It thus is entirely proper—indeed, vital—that forensic witnesses' claims be subject to the ordinary Sixth Amendment process of live testimony subject to cross-examination.

## ARGUMENT

Prior to its decision in *Crawford v. Washington*, 541 U.S. 36 (2004), this Court assumed on three separate occasions that the Sixth Amendment's Confrontation Clause requires the prosecution, absent a stipulation from a defendant, to present the findings of its forensic examiners through live testimony at trial. *See California v. Trombetta*, 467 U.S. 479, 490 (1984) ("[T]he defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the fact-finder whether the test was properly administered."); *United States v. Wade*, 388 U.S. 218, 227-28 (1967) (When the government performs

"scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like[,] . . . the accused has the opportunity for a meaningful confrontation of the Government's case at trial."); *Diaz v. United States*, 223 U.S. 442, 450 (1912) (Certain pretrial "testimony" including an autopsy report "could not have been admitted without the consent of the accused . . . because the accused was entitled to meet the witnesses [who prepared the report] face to face."). A straightforward application of *Crawford*'s now-controlling "testimonial" framework confirms the correctness of this Court's prior assumptions.

### A. A State Forensic Analyst's Laboratory Report Prepared For Use In A Criminal Prosecution Is "Testimonial" Evidence.

1. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. A "witness[]" is a person who gives testimony. Accordingly, in *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that the prosecution may not introduce "testimonial" hearsay against a criminal defendant absent a showing both that the declarant is unavailable and that the defendant had a prior opportunity for cross-examination. *Id.* at 54, 68.

The *Crawford* opinion and this Court's subsequent decision in *Davis v. Washington,* 547 U.S. 813 (2006), "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Crawford*, 541 U.S. at 68; *see also Davis,* 547 U.S. at 822 (2006). Nonetheless, this Court has provided

considerable guidance concerning the concept. As a starting point, this Court has noted that "testimony" is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 541 U.S. at 51 (quoting 2 Noah Webster, American Dictionary of the English Language (1828)). This Court also has emphasized that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure"—particularly "its use of *ex parte* examinations" and "sworn *ex parte* affidavits" as substitutes for live testimony against the accused. *Id.* at 50, 52 n.3; *see also Dowdell v. United States,* 221 U.S. 325, 330 (1911) (Confrontation Clause "intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits"); *Mattox v. United States*, 156 U.S. 237, 242 (1895) (clause intended to prohibit use of "*ex parte* affidavits" in place of live testimony).

The Framers directed the Clause at the civil-law method of creating and presenting accusatory evidence for two main reasons. First, the prosecution's submission of written declarations deprives the accused of "an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox,* 156 U.S. at 242-43; *see also* 3 William Blackstone, Commentaries on the Laws of England *373-74 (1768) (same). Second, the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again

throughout a history with which the Framers were keenly familiar." *Crawford*, 541 U.S. at 56 n.7. The Confrontation Clause "must be interpreted with this focus in mind." *Id.* at 50.

Applying these guiding principles, this Court held in *Crawford* that statements made by an individual to governmental officers during a stationhouse interrogation are testimonial. *Id.* at 51-52. This Court explained that police officers conducting interrogations perform "investigative functions" with an eye toward preparing cases for prosecution. *Id.* at 53. Consequently, allowing prosecutors to introduce records of such investigative statements instead of live testimony subject to cross-examination "presents the same risk[s]" of inaccuracy and distortion as the historical trial-by-affidavit abuses that the Framers decried. *Id.* at 53.

In *Davis*, this Court refined *Crawford*'s application to official interrogations, holding that statements made to governmental agents "are testimonial when the circumstances objectively indicate . . . that the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution." *Davis,* 547 U.S. at 822. That being so, a person's statement to a police officer responding to the scene of a suspected crime was testimonial because she gave it as part of the officer's "investigation into possibly criminal past conduct," and the statement "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." *Id.* at 829-30. "Such statements," this Court explained, "are an obvious substitute for live testimony, because they do precisely *what a witness*

*does* on direct examination; they are inherently testimonial." *Id.* at 830 (emphasis in original). In other words, when "*ex parte* actors and the evidentiary products of the[ir] *ex parte* communication[s] a'ign[] perfectly with their courtroom analogues," the communications are testimonial. *Id.* at 828.

By contrast, this Court also held in *Davis* that a person's cry for help to a 911 operator was not testimonial. Even though the caller's statements described criminal activity, this Court explained that the 911 operator elicited the statements "to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." *Davis*, 547 U.S. at 827. Accordingly, the caller "simply was not acting as a *witness* . . . . No 'witness' goes into court to proclaim an emergency and seek help." *Id.* at 828.

2. A state forensic analyst's laboratory report prepared as part of a police investigation is plainly testimonial evidence. Forensic examiners in Massachusetts, as elsewhere, create such laboratory reports at the behest of police officers "for the enforcement of law." Mass Gen. Laws ch. 111, § 12. The reports are formal, sworn statements. Mass. Gen. Laws ch. 111, § 13; *see* Pet. App. 24a-29a. Indeed, they are the functional equivalent of affidavits, insofar as an affidavit is "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public." Black's Law Dictionary 62 (8th ed. 2004). And such forensic reports are forthrightly offered at trial in lieu of "having the analyst called as a witness." Pet. App. 14a n.1. "That is, in fact, their very *raison*

*d'etre*: the whole idea of the certificates is to be used in lieu of the [live] testimony that would otherwise be necessary." Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington, 15 J. L. & Pol'y 791, 800 (2007). Sworn forensic reports are thus exactly the kind of "solemn declaration[s] or affirmation[s]" that *Crawford* and *Davis* characterized as quintessentially testimonial. *Crawford*, 541 U.S. at 51; *Davis*, 547 U.S. at 824.

The confrontation violation that occurs when, as here, a forensic laboratory report is introduced to establish an element of the crime at issue is particularly acute. In *Kirby v. United States*, 174 U.S. 47 (1899), the prosecution introduced a record of a co-conspirator's guilty plea for larceny to prove that property that the defendant had received was stolen. This Court held that introducing this record violated the Confrontation Clause because it served to prove, by means of unconfronted testimony, a "vital fact which the government was bound to establish affirmatively." *Id.* at 55-56. In other words, the introduction of the co-conspirator's statement of guilt, which the defendant was unable to cross-examine, unconstitutionally "enable[d] the government to put the accused, although shielded by the presumption of innocence, upon the defensive" concerning an element of the charge. *Id.* at 60-61. A contemporaneous treatise elaborated upon this holding: "[R]ecords are not admissible to prove the acts constituting the offense itself. Where a document or record relates to facts which are not such as can be proved only by an original or a certified copy, but may be established by oral testimony . . . the constitutional guaranty [of

confrontation] applies." 16 C.J.S. § 2113, at 837-38 (1918) (footnotes omitted).

Such is precisely the case here. One of the elements of the crimes with which petitioner was charged was that he possessed cocaine. J.A. 58, 61. In order to establish that element, the Commonwealth offered forensic analysts' sworn certificates. And the jury was instructed that it could find that petitioner possessed cocaine based on these certificates alone. J.A. 59, 61. As the D.C. Court of Appeals has stated, "it is difficult to imagine a statement more clearly testimonial" than a forensic report used in this manner. *Thomas v. United States*, 914 A.2d 1, 13 (D.C. 2006), *cert. denied*, 128 S. Ct. 241 (2007) (internal quotation and citation omitted).

### B. Neither Characterizing Forensic Laboratory Reports As Business Records Nor Deeming Them Objectively Reliable Exempts Them From Confrontation Scrutiny.

Six state high courts and four state intermediate courts have employed the straightforward analysis above to hold that forensic laboratory reports prepared in contemplation of prosecution are testimonial. *See State v. Johnson*, ___ So. 2d ___, 2008 WL 1901456 (Fla. May 1, 2008) (laboratory report identifying presence of illegal drug); *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007) (same); *State v. March*, 216 S.W.3d 663 (Mo.) (same), *cert. dismissed*, 128 S. Ct. 1441 (2007); *Thomas v. United States*, 914 A.2d 1 (D.C. 2006) (same), *cert. denied*, 128 S. Ct. 241 (2007); *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006) (same); *State v. Campbell*, 719 N.W.2d 374, 376 (N.D.

2006) (assuming same), *cert. denied,* 127 S. Ct. 1150 (2007); *State v. Laturner*, 163 P.3d 367 (Kan. Ct. App. 2007) (report certifying presence of illegal drug); *State v. Moss*, 160 P.3d 1143 (Ariz. Ct. App. 2007) (report alleging presence of illegal drugs in blood sample); *State v. Smith*, 2006 WL 846342 (Ohio Ct. App. 2006) (report certifying that substance contained illegal drug); *State v. Miller*, 144 P.3d 1052 (Or. Ct. App.) (same), *opinion adhered to on reconsideration*, 149 P.3d 1251 (Or. Ct. App. 2006).

In this case, however, the Appeals Court of Massachusetts reached the opposite conclusion. Following the Massachusetts Supreme Judicial Court's decision in *Commonwealth v. Verde*, 827 N.E.2d 701 (2005), the Appeals Court held that forensic reports certifying under oath that the substances the police seized in connection with petitioner's arrest contained an illegal drug were *not* testimonial. The *Verde* decision, which is reproduced at Pet. App. 12a-23a, advanced two reasons for deeming such reports nontestimonial. First, the Massachusetts Supreme Judicial Court asserted that a drug analysis certificate "is akin to a business or official record, which the Court [in *Crawford*] stated was not testimonial in nature." Pet. App. 18a. Second, the Massachusetts Supreme Judicial Court reasoned that drug analysis reports "are neither discretionary nor based on opinion," but rather are a product of a "well-recognized scientific test." Pet. App. 17a.

Neither of these rationales withstands scrutiny.

1. The Massachusetts Supreme Judicial Court's assertion that a state-generated drug analysis certif-

icate is "akin to a business or official record" is irrelevant to the constitutional issue presented here. This Court squarely held in *Crawford* that the Confrontation Clause is a rule of criminal procedure that does not turn on "the vagaries of the rules of evidence." 541 U.S. at 61. Accordingly, the fact that a state has deemed a piece of evidence to be admissible under one of its hearsay exceptions does not determine whether it can be introduced against the accused in a criminal trial. *Id.* at 50-51.

To be sure, this Court noted in *Crawford* that certain hearsay exceptions encompass types of statements that "by their nature [a]re not testimonial." *Id.* at 56. And the exception for business records that existed at the time of the Founding was one such provision. The scope of that exception, however, was extremely limited. It permitted the introduction only of "shop-books"—that is, ledgers of "men of trades and handicraftsmen" recording wares shipped, sold, and received. 5 John H. Wigmore, Wigmore on Evidence §§ 1517-18, at 347 (3d ed. 1940) (quotation marks omitted); *see also Radtke v. Taylor,* 210 P. 863 (Or. 1922) (detailing history of shop-book rule).

The common-law shop-book exception for regularly kept business records did not remotely encompass reports generated for use in investigations or litigation. Indeed, as late as the mid-twentieth century this Court declined to expand the federal hearsay exception for business records to cover a railroad's accident report that it purportedly created in the regular course of business. *See Palmer v. Hoffman*, 318 U.S. 109, 113-15 (1943). This Court explained that the business-record rule applied only to

"the management or operation" of businesses. *Id.* at 113. Extending the rule to cover records "calculated for use essentially in the court" or created during the "[p]reparation of cases for trial" would "completely empty the words of the [business-records rule] of their historic meaning." *Id.* at 113-14; *see also State v. Simbara*, 811 A.2d 448, 455 (N.J. 2002) ("A laboratory certificate in a drug case is not of the same ilk as other business records, such as an ordinary account ledger or office memorandum in a corporate-fraud case.").

Nor did the common-law hearsay exception for official (or public) records—to the extent it even existed at the time of the Founding—cover reports produced in anticipation of litigation. Rather, the exception developed to allow the introduction of "[o]fficial registers, or books kept by persons in public office, in which they are required to write down particular transactions, or to enrol or record particular contracts or instruments." *Ferguson v. Clifford*, 37 N.H. 86, 95 (1858). Even today, the Federal Rules of Evidence expressly prohibit using the "public records" hearsay exception in criminal cases to introduce reports recording "matters observed by police officers and other law enforcement personnel" or "factual findings resulting from an investigation made pursuant to authority granted by law." Fed. R. Evid. 803(8)(B) & (C). The Rule's drafters codified these prohibitions while otherwise expanding the reach of the Rule in order to avoid "the almost certain collision with confrontation rights which would result from [such records'] use against the accused in a criminal case." Advisory Committee's Notes, Note to Paragraph (8) of Rule 803, 56 F.R.D. 313 (1972); *see also Kirby*, 174 U.S. at 60-61 (official record of co-conspirator's guilty

plea not admissible in place of co-conspirator's live testimony); *United States v. Oates*, 560 F.2d 45, 63-84 (2d Cir. 1977) (chemist report prepared for prosecution cannot be characterized as "public record"); *Cole v. State*, 839 S.W.2d 798, 801-06 (Tex. Crim. App. 1990) (same).

It makes no difference that some jurisdictions have recently expanded their statutory definitions of business or official records to encompass forensic laboratory reports. No matter how classified under state hearsay law, sworn statements that law enforcement officers gather "to establish or prove past events potentially relevant to later criminal prosecution" are testimonial. *Davis*, 547 U.S. at 822. And as this Court emphasized in *Crawford*, the reasons for subjecting testimonial statements to confrontation procedures "do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." 541 U.S. at 56 n.7. Accordingly, jurisdictions may no more insulate state crime laboratory reports from the adversarial process by labeling them business or official records than they could by giving the same label to transcripts of custodial interrogations, which, after all, police conduct as public officials in their ordinary course of business. *See Johnson*, ___ So.2d at ___, 2008 WL 1901456, at *5. "*[E]x parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them." *Crawford*, 541 U.S. at 51.

From the time of the Founding until the germination of this Court's now-abandoned *Roberts*

framework, courts generally recognized as much. During the nineteenth and early twentieth centuries, prosecutors occasionally tried to invoke business- or public- record rules to introduce certifications prepared with an eye toward litigation in lieu of live testimony. Yet courts applying state constitutional counterparts to the Confrontation Clause consistently rejected such attempts.[3] Federal cases during this era reached similar conclusions.[4]

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[3] *See State v. Green*, 109 So. 143, 144 (La. 1926) (introduction of certification concerning public death registry violated right to confrontation); *State v. Joseph*, 101 So. 21, 21 (La. 1924) (admission of medical examiners' certification regarding cause of death violated right to confrontation); *State v. Dixon*, 117 S.E. 170, 171-72 (N.C. 1923) (even if bank's certification of a party's lack of funds in account would be admissible in "a civil action involving a construction of the law of merchant," it constituted "testimony" that was inadmissible in a criminal prosecution absent the declarant testifying at trial); *People v. Bromwich*, 93 N.E. 933, 934 (N.Y. 1911) (same respecting certificate from court clerk stating that no record of naturalization existed); *People v. Goodrode*, 94 N.W. 14, 15-16 (Mich. 1903) (same regarding certificate from court clerk saying no marriage record existed); *Colquit v. State*, 64 S.W. 713, 714 (Tenn. 1901) (same regarding coroner's inquest); *State v. Parker*, 7 La. Ann. 83, 1852 WL 3553, at *2 (La. 1852) (same); *Farrington v. State*, 10 Ohio 354, 1841 WL 4, at *1-2 (Ohio 1841) (same regarding notary public's certification in forgery prosecution that names on notes and bills were fictitious because it constituted unconfronted "testimony"). Some state courts during this period went even further, holding that the admission of certain business records prepared without any connection to potential litigation violated state confrontation clauses. *See, e.g., People v. Schallman*, 113 N.E. 113 (Ill. 1916) (merchant's ledger); *Cook v. State*, 120 P. 1038 (Okla. Crim. App. 1911) (freight delivery receipts); *People v. Mitchell*, 29 P. 1106 (Cal. 1892) (train register of arrivals and departures); *State v. Thomas*, 64 N.C. 74, 1870 WL 1668 (N.C. 1870) (railroad's delivery ledger).

Indeed, just three years before this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), the Tennessee Supreme Court noted that with the exception of a few Prohibition-era cases involving the chemical analysis of alcohol, it could "find no reported cases in which the very identity of [seized substances] as contraband has been established by hearsay." *State v. Henderson*, 554 S.W.2d 117 (Tenn. 1977) (quotation omitted); *see also infra* at 29-30 (discussing Prohibition-era cases). Specifically rejecting the state's argument that chemists' certifications could be introduced in lieu of live testimony because they could be characterized as business records, the Tennessee Supreme Court explained:

> From the record it appears that the chemists were well-trained to perform the tests involved and that they had no apparent motive to falsify the reports. Yet it must also be noted that the records in this case, while they may satisfy the technical requirements of [Tennessee's business-records rule], do not fit the classic business records mold, *i.e.* "shop books" or hospital records. . . . [T]he records here realistically cannot be said to have been prepared for any reason other than their potential litigation value. Therefore, when they are produced at trial in

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[4] *See Naftzger v. United States*, 200 F. 494 (8th Cir. 1912) (admission of post office inspector's report concerning post office robberies violated Confrontation Clause); *United States v. Elder*, 232 F. 267 (W.D. Ky. 1916) (same respecting official records created for IRS enforcement actions because they constituted unconfronted hearsay "testimony").

> lieu of personal testimony, and are offered to prove the single most damaging fact against this defendant, they fall into the category of the dreaded *ex parte* affidavit. It was to prevent the use of just such documents that the Confrontation Clause was adopted. *Mattox v. United States*, 156 U.S. at 242-43. (Moreover, we are not unaware that at the time they performed the tests and made the reports, both absent witnesses were employees of the State, the very party now prosecuting this defendant and offering against him evidence which consisted of certain items allegedly bought by another State employee.)

*Henderson*, 554 S.W.2d at 120.

Other courts confronted with similar arguments during the pre-*Roberts* era likewise held that expansive business- or official-records rules could not trump confrontation objections to the introduction of other kinds of forensic reports created for litigation. *See Stewart v. Cowan,* 528 F.2d 79, 83-85 (6th Cir. 1976) (introduction of ballistics report constituted improper *ex parte* "testimony"); *Commonwealth v. McCloud,* 322 A.2d 653, 656-57 (Pa. 1974) ("evidentiary use, as a business records exception to the hearsay rule, of an autopsy report in proving legal causation [in a homicide case] is impermissible unless the accused is afforded the opportunity to confront and cross-examine the medical examiner who performed the autopsy"). A few courts adhered to this view even after *Roberts*

conflated the rules of evidence with the Confrontation Clause.[5]

Of course, the Commonwealth of Massachusetts does not even classify the forensic certificates here as business or official records. Massachusetts' business-records rule, reflecting the historical roots of that hearsay exception, requires that a record be created "before the beginning of the civil or criminal proceed-

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[5] *See Miller v. State*, 472 S.E.2d 74, 77-79 (Ga. 1996) (drug analysis certificate introduced as business record constituted "hearsay *testimony*" in violation of Confrontation Clause when offered in lieu of live testimony) (emphasis added); *United States v. McClintock*, 748 F.2d 1278, 1290-92 (9th Cir. 1984) (introducing analyses of values of gemstones in lieu of live testimony violated Confrontation Clause). The majority of jurisdictions during the *Roberts* era, however, allowed forensic laboratory reports characterized as business or official records to overcome confrontation objections on the ground that the records were sufficiently reliable. *See, e.g., Howard v. United States*, 473 A.2d 835 (D.C. 1984), *overruled by Thomas v. United States*, 914 A.2d 1 (D.C. 2006). This trend actually started following this Court's decision in *Dutton v. Evans*, 400 U.S. 74 (1970), in which a plurality of this Court sowed the seeds of *Roberts* by rejecting a defendant's challenge to the admission of a co-conspirator's statement in part on the ground that the statement was reliable. *See State v. Kreck*, 542 P.2d 782, 784-88 (Wash. 1975) (upholding introduction of unconfronted laboratory report on the ground that it could be likened to business or official records and deemed reliable); *State v. Larochelle*, 297 A.2d 223 (N.H. 1972) (same). One justice dissenting from one of these initial decisions bemoaned: "[U]nder the rule adopted by the plurality in *Dutton* and this court in the case before us, the right to confrontation can be wiped out by unlimited exceptions to the hearsay rule so long as a majority of the court decides that the evidence possesses sufficient 'indicia of reliability.' This is an amorphous test indeed. Such a view, it seems to me, substitutes a rule of men for one of law and reduces a great safeguard to dependence upon the whim of judges." *Larochelle*, 297 A.2d at 228 (Grimes, J., dissenting).

ing" at issue. Mass. Gen. Laws Ch. 233, § 78. Drug analysis certificates obviously fail that test. Accordingly, the prosecution here introduced the drug analysis certificates under Massachusetts' special statutory hearsay exception, Mass. Gen. Laws ch. 111, § 13, allowing such certificates to be introduced in lieu of live testimony.

But just as with invocations of expansive business- or official-record rules, introducing testimonial hearsay evidence under a special exception "akin to" a business or official record rule (Pet. App. 18a) cannot insulate it from the ordinary adversarial process. And just as with pre-*Roberts* invocations of expansive business- or official-record rules, courts during pre-*Roberts* era generally recognized as much. During the nineteenth century, a handful of state statutes specifically provided that prosecutors could introduce milk inspectors' sworn certificates stating that milk had been adulterated as evidence of adulteration. When state high courts reviewed prosecutorial invocations of these statutes, the courts noted the potential for a confrontation problem. But they did not find such violations because—as this Court consistently has held—"when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements," *Crawford*, 541 U.S. at 59 n.9 (citing *California v. Green*, 399 U.S. 149, 162 (1970)), and the milk inspectors in these prosecutions testified at trial. *See Commonwealth v. Waite*, 93 Mass. 264, 266 (1865) (fact that inspector "testified [at trial] to all the facts set forth in the certificate" satisfied right to confrontation); *State v. Newton*, 45 N.J.L. 469, 1883 WL 8120, at *5 (N.J. 1883) ("The validity of this

provision does not arise in this case because the chemist himself was examined and cross-examined at the trial."); *State v. Campbell,* 13 A. 585, 586 (N.H. 1888) (same); *People v. Salisbury,* 37 N.Y.S. 420, 421 (N.Y. App. Div. 1896) (noting that examiner "was called as a witness for the people"). Indeed, it does not appear that any prosecutor in the milk cases ever forced this issue by introducing a certificate without also calling the milk inspector to the stand. And many other cases involving other kinds of forensic tests and similar certifications note that the examiners testified at trial, reinforcing the inference that this was the typical and accepted practice.[6]

On the rare occasions when prosecutors did introduce certificates produced for trial under special hearsay rules without also producing the authors to testify at trial, courts did not hesitate to find confrontation violations. *See State v. Reidel,* 26 Iowa 430, 1869 WL 237, at *3-4 (Iowa 1869) (introduction of certification from notary public of non-existence of bank funds violated right to confrontation because declarant did not testify); *Wilson v. State,* 75 So. 95, 97 (La. 1917) (same regarding certification from internal revenue collector describing license issued to defend-

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[6] *See, e.g., State v. Hinkle,* 6 Iowa 380, 1858 WL 158, at *5 (Iowa 1858) (test for poison in stomach of murder victim); *State v. Bowman,* 78 N.C. 509, 1878 WL 2385, at * 1 (N.C. 1878) (same); *Dane v. State,* 35 S.W. 661, 662 (Tex. Crim. App. 1896) (test for presence of alcohol in liquid). Early treatises on expert testimony also discuss forensic evidence without ever suggesting that forensic examiners did not need to testify during trials. *See* Henry Wade Rogers, The Law of Expert Testimony §§ 76-78, 80, 83 (1883); John D. Lawson, The Law of Expert and Opinion Evidence 6-8, 121(1883).

ant). The only less-than-uniform line of authority in this respect involved statutes allowing reports certifying the presence of alcohol to be introduced against the accused in Prohibition-era prosecutions. *Compare Torres v. State*, 18 S.W.2d 179, 180 (Tex. Crim. App. 1929) (admitting report "in the absence of the chemist who made the analysis" was "plainly violative of the constitutional right of this appellant to be confronted by the witnesses against him"); *Volrich v. State*, 4 Ohio Law Abs. 253, 1925 WL 2473 (Ohio. App. 1925) (same), *with State v. Torello*, 131 A. 429 (Conn. 1925) (no violation); *Commonwealth v. Slavski*, 140 N.E. 465 (Mass. 1923) (same); *Bracey v. Commonwealth*, 89 S.E. 144 (Va. 1916) (same); *see also Kay v. United States*, 255 F.2d 476, 478, 480-81 (4th Cir. 1958) (following *Bracey* to uphold the admission of blood alcohol test under similar Virginia hearsay exception).

But to the extent that a few decisions allowed such certificates to be introduced in the absence of live testimony, they did so based on reasoning unequivocally rejected in *Crawford*. Perhaps influenced by the contemporaneous publication of Wigmore's influential treatise on evidence, these decisions supposed that "[t]he rules of evidence relating to the admissibility of exceptions to the hearsay rule are the same in civil and criminal actions." *Torello*, 131 A. at 431; *see also Slavski*, 140 N.E. at 468-69 (interchanging civil and criminal cases). *Crawford*, however, makes clear that the federal Confrontation Clause does not operate in this manner: "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." 541 U.S. at 51. If a statement is testimonial in nature, it remains

subject to the Confrontation Clause regardless of whether it falls within a modern hearsay exception.

2. The Massachusetts Supreme Judicial Court's assertion that forensic reports identifying controlled substances are not testimonial because they are "neither discretionary nor based on opinion," Pet. App. 17a, is similarly baseless. "[A] witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause . . . if his testimony is part of the body of evidence that the jury may consider in assessing his guilt." *Cruz v. New York*, 481 U.S. 186, 190 (1987). Hence, the Confrontation Clause applies with full force to *all* prosecutorial witnesses, regardless of whether they describe objectively verifiable facts or they offer an opinion concerning who committed the crime. A neighbor's statement telling the police that she saw a blue car drive down the street at midnight is no less testimonial than an assault victim's statement saying that John Doe beat him up and then sped away in his blue car. Indeed, the statements that this Court held in *Crawford* and *Davis* were testimonial involved mostly objective, factual assertions. *See Crawford*, 541 U.S. at 39-40; *Davis*, 547 US. at 820-21.

The most that might be said for out-of-court declarations that are factual, as opposed to opinionated, in nature is that objective declarations are more likely to be reliable. But allowing the untested introduction of statements prepared with an eye toward trial on the ground that judges deem the statements "reliable" is "fundamentally at odds with the right to confrontation." *Crawford*, 541 U.S. at 61. As this Court explained in *Crawford*, the Confrontation

Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 62. Accordingly, defendants have a right to insist that prosecutorial testimony be presented through the traditional adversarial process, regardless of whether judges surmise that cross-examination would likely bear fruit. *See id.* at 61-62, 68-69.

In any event, the Massachusetts Supreme Judicial Court's assumption that cross-examination is unlikely to be productive in this context is greatly exaggerated. That court assumed that laboratory reports identifying a substance as contraband are reliable because they purport to be the objective product of a "well-recognized scientific test." Pet. App. 17a. But forensic examiners can lie about the results of well-recognized scientific tests. Indeed, recent examples abound of falsified and otherwise corrupt forensic testing being used in criminal prosecutions. *See* Br. of Innocence Projects as *Amici Curiae*.

Even putting aside the potential for fabrication, many scientific and legal experts have explained that testing for the presence of drugs is hardly a simple, objective or foolproof enterprise. In order to produce trustworthy results, analysts, among other things, must have sufficient expertise and experience in forensic testing; they must handle samples in manners that ensure the samples' integrity; they must use dependable testing methods; they must interpret their

data properly; and they must verify tentative conclusions by testing samples using at least two different methods. United States Dep't of Justice, Drug Enforcement Administration & Executive Office of the President, Office of National Drug Control Policy, Counterdrug Technology Assessment Center, *Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG) Recommendations*, at 14-26 (3d ed. 2007-08-09); Giannelli, *supra*, 49 Ohio St. L.J. at 688-95.

Indeed, there are at least *seventeen different methods* currently used for analyzing seized substances for the presence of drugs, each involving differing systematic error rates, *SWGDRUG, supra,* at 14, and differing "element[s] of subjectivity." 2 Paul C. Giannelli & Edward J. Imwinkelried, Scientific Evidence §23.02[b] & [c] (4th ed. 2007); *see also* Melvin B. Lewis, *The Element of Subjectivity in Interpreting Instrumental Test Results*, in Practicing Law Institute, Scientific and Expert Evidence 409 (2d ed. 1981); S.K. Niyogi, *Toxicology*, in Scientific and Expert Evidence, *supra*, 343, 343-44, 349-86. The leading treatise on scientific evidence further observes:

> This is an especially appropriate time to put drug testing under the microscope. There have been recent indications that drug identification testimony is sometimes erroneous or worse. Despite the extensive experience of drug tests, there seems to be a significant error rate in drug testing conducted by some American laboratories . . . .

Giannelli & Imwinkelreid, *supra*, at §23.01; *see also* U.S. Dep't of Justice, Project Advisory Committee,

*Laboratory Proficiency Testing Program, Supplementary Report—Samples 6-10*, at 3 (1976) (finding that 30% of state forensic examiners asked to test a substance for the presence of cocaine rendered incorrect results); 2 David Bernheim, Defense of Narcotics Cases §§ 4.06-13 (1992 rev. ed.) (describing various drug-testing methods in detail, errors commonly made in such testing, and outlining methods of challenging such evidence); *see generally* Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. Rev. 163 (2007) (describing problems with other kinds of forensic testing).[7] A significant percentage of crime laboratories, including the one that performed the testing in this case, *see supra* at 6, are not even accredited. Metzger, *supra*, 59 Vand. L. Rev. at 494.

These realities demand that state forensic examiners' evidentiary certifications be subject to the customary processes of direct and cross-examination. If state forensic examiners understand that they may have to present and defend their work in front of judges and juries at public trials, they are more likely to be careful and conscientious, and to use the best available testing methods. They also are more likely to divulge information and data surrounding their tests in advance of trial. And when examiners do make mistakes or commit malfeasance, our judicial system's traditional adversarial process is more likely than a system of trial-by-affidavit to expose the truth.

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[7] A congressionally created committee of the National Academy of Sciences is currently studying the efficacy of forensic testing and expects to issue a report at the end of this summer. *See Identifying the Needs of the Forensic Sciences Community*, http://www8.nationalacademies.org/cp/projectview.aspx?key=4871.

There is no doubt our Framers understood this, and a straightforward application of *Crawford* and *Davis* reaffirms that time-tested principle.

## CONCLUSION

For the foregoing reasons, the decision of the Appeals Court of Massachusetts should be reversed.

Respectfully submitted,

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# APPENDIX

# APPENDIX

[GREAT SEAL OF MASSACHUSETTS]

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Department of Public Health
William A. Hinton State Laboratory Institute
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Governor
TIMOTHY P. MURRAY
Lieutenant Governor
JUDYANN BIGBY, MD
Secretary
JOHN AUERBRACH
Commissioner

May 30, 2008

David J. Nathanson, Esq.
Wood & Nathanson, LLP
Attorneys at Law
83 Atlantic Avenue
Boston, Massachusetts 02110

RE: Public Records Request

Dear Mr. Nathanson:

I am writing in response to your letter dated May 22, 2008 regarding the Massachusetts Department of Public Health Drug Analysis Laboratories. The

laboratories provide accurate identification of illicit drugs and pharmaceuticals for law enforcement purposes using methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs. Appropriate quality control and quality assurance practices are regularly employed to ensure the integrity of the sample data.

The drug laboratories are not currently accredited by an external certification body.

Sincerely,
/s/
Julianne Nassif
Director
Division of Analytical Chemistry

# RESPONDENT'S BRIEF

101

(12)

No. 07-591

FILED
SEPT 2, 2008
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SUPREME COURT, U.S.

IN THE
# Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,
*Petitioner,*

*v.*

COMMONWEALTH OF MASSACHUSETTS,
*Respondent.*

ON WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

## BRIEF FOR RESPONDENT

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## QUESTION PRESENTED

During Petitioner's trial on drug charges, the Commonwealth introduced certificates establishing the composition and weight of the drugs. The certificates did not accuse Petitioner of criminal conduct, and were prepared by a state laboratory in the regular course of its business as required by statute. Petitioner had multiple opportunities to challenge the certificates and cross-examine the analysts but strategically elected not to do so. Did admission of the certificates violate Petitioner's Sixth Amendment confrontation rights?

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## STATEMENT OF THE CASE

1. A Massachusetts jury convicted Petitioner of distributing cocaine and trafficking in 14 grams or more of cocaine in violation of Mass. Gen. Laws ch. 94C, § 32A and § 32E(b)(1). Petitioner and his codefendant, Ellis Montero, sold cocaine to Thomas Wright, a K-Mart store employee whose suspicious short absences from the store triggered the police investigation that led to Petitioner's arrest. Appendix to Petition ("App.") 1a-2a, 6a-7a. Two batches of cocaine were at issue. App. 3a n.1, 4a n.2. The first batch consisted of 4 bags of cocaine that the arresting officer, Detective Robert Pieroway, seized from Wright after he exited the car driven by Montero and Petitioner. App. 3a. The second batch consisted of 19 bags of cocaine that the police found in the backseat area of the police cruiser used to transport Petitioner, Montero, and Wright following their arrests. App. 4a.

In accordance with Mass. Gen. Laws ch. 111, §§ 12-13, the police submitted both batches of cocaine to the state Department of Public Health for analysis. Section 12 requires the Department to "make . . . a chemical analysis of any narcotic drug . . . when submitted to it by police authorities . . . provided, that it is satisfied that the analysis is to be used for the enforcement of law." Section 13, in turn, provides that an "analyst or an assistant analyst of the department . . . shall upon request furnish a signed certificate, on oath, of the result of the [chemical] analysis [of a narcotic drug submitted to it by police authorities]." The certificate must be

sworn and contain a statement identifying the subscriber as an analyst or assistant analyst of the department. *Id.*

These statutes are intended "to simplify proof of chemical analyses performed routinely and accurately by a public agency and to reduce court delays and the inconvenience of having busy public servants called as witnesses" in every case where drug analysis evidence is presented. *Commonwealth v. Johnson*, 589 N.E.2d 328, 330 (Mass. App. Ct. 1992). When the statutory requirements are met, the certificate is "admissible only as prima facie evidence of the composition . . . and weight of the substance . . . , which a defendant may rebut if he doubts its correctness. . . ." *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005).

As *prima facie* evidence, the certificate "carries no particular presumption of validity." *Commonwealth v. Berrio*, 687 N.E.2d 644, 645 (Mass. App. Ct. 1997). Rather, "the weight to be accorded [it] is a matter left entirely to the jury's discretion." *Id.* The jury, if it so chooses, may disregard the certificate entirely, even when no contrary evidence is presented. *Id.* at 646.

2. Prior to trial, the Commonwealth provided Petitioner with copies of the certificates prepared in connection with the cocaine seized from Wright and the backseat area of the cruiser. *See* Joint Appendix ("J.A.") 5. Petitioner did not seek to rebut the correctness of the certificates, although he had the right to do so. *See Verde*, 827 N.E.2d at 705. He did

not, for instance, seek any discovery concerning the testing methods underlying the certificates or the qualifications of the analysts who performed the testing, as he could have pursuant to Mass. R. Crim. P. 14. Nor did he seek any funds to pay for his own independent chemical analysis, as authorized by Mass. R. Crim. P. 41 and Mass. Gen. Laws ch. 261, § 27B. In addition, Petitioner did not request a pre-trial evidentiary hearing to challenge the validity of the testing methods used in preparing the certificates or the qualifications of the analysts who prepared the certificates, even though Massachusetts law provides a procedure for doing so. *See Commonwealth v. Patterson,* 840 N.E.2d 12, 28-29 (Mass. 2005). Above all, Petitioner did not subpoena the analysts to appear at trial, as Mass. R. Crim. P. 17 permits.

Petitioner did none of these things because his overall trial strategy was not to dispute the composition or weight of the drugs, but to persuade the jury that there was no evidence directly linking him – as opposed to Wright or Montero – to the cocaine. *See* J.A. 11, 43-48. Petitioner's counsel argued in closing: "[T]he amount of drugs isn't in question. What is in question is who possessed those drugs." J.A. 47; *see also* J.A. at 11 (defense opening statement: the "whole issue in the case" is who possessed the drugs). The composition and weight of the drugs, in short, were not contested issues at Petitioner's trial.

Consistent with this strategy, Petitioner failed to object to testimony establishing both the

composition and weight of the 4 bags of cocaine recovered from Wright. Wright, for instance, told Pieroway that "he had four bags of cocaine on his person." App. 3a; J.A. 35. Pieroway, an experienced drug enforcement officer who had seen cocaine similar to this "in excess of two thousand times during his career," testified that each of the 4 bags contained "at least" a gram of cocaine. J.A. 26-27. Sergeant Detective Paul Murphy, a veteran police officer with more than 19-years experience and an expert on street-level drug dealing, likewise testified that the 4 bags were all "about the same size" and appeared to contain the "same amount of cocaine." J.A. 11, 17-20, 28.

Petitioner also neither disputed nor objected to testimony that the 19 bags recovered from the backseat area of the cruiser contained cocaine and were "identical" to the cocaine seized from Wright. J.A. 33-34, App. 5a. Pieroway, for instance, testified that, after Petitioner, Montero, and Wright got out of the cruiser, a police officer found "a plastic bag that contained [19] plastic bags of cocaine" in the area where they were sitting. J.A. 31.[1] Murphy similarly testified that the 19 bags each contained about the same amount of cocaine as the 4 bags seized from

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[1]On cross-examination, Pieroway appeared to acknowledge that, apart from the laboratory reports, he had no "real knowledge" of what was in the bags. J.A. 35. This concession, however, reflected merely that Pieroway's testimony that the bags each contained about a gram of cocaine was based not on any scientific analysis, but on his training and experience as a narcotics officer. *See* J.A. 26-27.

Wright. J.A. 18-20. Another police officer likewise testified that the 19 bags contained "drugs," J.A. 37, which his partner identified as "cocaine." J.A. 40.

In addition to this direct testimony establishing the composition and weight of the drugs, the Commonwealth presented circumstantial evidence as well. At the time of Petitioner's arrest, cocaine was "packaged primarily in plastic bags, a corner of a sandwich bag . . . and the amount [was] put in there and wrapped and knotted and cut off." J.A. 17, 34. The packaging of the cocaine recovered from Wright and the backseat area of the cruiser was consistent with how cocaine ordinarily was packaged for sale. J.A. 33-34.

Murphy further testified, based on his experience in conducting hundreds of drug surveillance operations, that drug dealers operating at the time of Petitioner's arrest frequently conducted their transactions in cars to avoid detection. J.A. 12-16. The dealers would pick up the buyer in their car and then "take basically a meaningless ride" for a short distance to complete the transaction. J.A. 14-15. Petitioner and Montero's sale to Wright fit this pattern. App. 1a-4a.

Drug dealers, at the time of Petitioner's arrest, also often relied on pagers and cell phones to maintain contact and arrange drug sales. J.A. 15-16. And, following their arrest, police often found that dealers possessed cash in a variety of denominations. J.A. 16. During the booking process, police recovered two cell phones and $301 from Montero,

and a pager and $157 from Petitioner. App. 4a. In addition, police found $320 on the ground outside the cruiser – "the same amount that Wright had paid for his purchase of the [4] bags of cocaine. . ." *Id.* at 4a-5a.

3. Notwithstanding this substantial, uncontested evidence establishing the composition and weight of the drugs recovered from Wright and the backseat area of the cruiser, Petitioner's counsel objected, merely mentioning "*Crawford [v.] Washington*" without explanation, when the prosecutor asked Pieroway the results of analysis conducted on the bags. J.A. 29, 32. The judge overruled the objection and admitted the certificates. *Id.*; App. 24a-29a. The certificates confirmed that the 4 bags recovered from Wright contained 4.75 grams of cocaine, J.A. 30; App. 24a-27a, and that the 19 bags recovered from the backseat area of the cruiser contained 22.16 grams of cocaine. J.A. 32, App. 28a-29a.

In preparing drug analysis certificates, the Department of Public Health follows the methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs ("SWGDRUG").[2] In this Court, Petitioner relies on SWGDRUG's recommendations to contend that drug

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[2]*See* Letter of Julianne Nassif, Director, Division of Analytical Chemistry, Executive Office of Health and Human Services, Massachusetts Department of Public Health, to David J. Nathanson, Esq. (May 30, 2008) (reproduced in Petr.'s Br. App. 1a-2a).

analysis is "hardly a simple, objective or foolproof enterprise," and he relies on outdated sources, including a 32-year old study, to suggest that testing errors are pervasive. Petr.'s Br. at 31-33. Because he failed to contest the composition or weight of the drugs at trial, however, the record is silent as to the precise testing techniques used by the laboratory.

Had Petitioner sought to challenge the Department's drug analysis, the Commonwealth would have responded with detailed explanations of the analysis' validity. Contrary to Petitioner's suggestions in this Court, commonly-used testing techniques enjoy broad scientific acceptance. For instance, gas chromatography/mass spectrometry ("GC/MS") is one of the most common specific (Category A) techniques recommended by SWGDRUG. See 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence*, § 23.03[c] (4th ed. 2007); SWGDRUG Recommendations 14 (3d ed. 2007), *available at* http://www.swgdrug.org/approved.htm.

The GC/MS technique is the "gold standard" in chemical analysis. *Goebel v. Warner Transp.*, 612 N.W.2d 18, 22 (S.D. 2000); E. Imwinkelried, *Should the Courts Incorporate a Best Evidence Rule Into the Standard Determining the Admissibility of Scientific Testimony?*, 50 Case W. Res. L. Rev. 19, 31-32 (1999). The suspected drugs are separated from other components that may be present in the sample and then bombarded by small particles, causing disintegration of the drug molecule into smaller fragments. *See* 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 23.03[c]. "The

identity of the original chemical can be confirmed by computerized analysis of the fragmentation pattern with essentially 100% accuracy." D. Greenblatt, M.D., *Urine Drug Testing: What Does it Test?*, 23 New Eng. L. Rev. 651, 655 (1988-89); *see also Taylor v. O'Grady*, 888 F.2d 1189, 1192 n.4 (7th Cir. 1989) ("surveys have rated [the GC/MS] as nearly infallible"). Indeed, this Court has described GC/MS analysis as "highly accurate." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 n.2 (1989).[3]

Although Petitioner alleges that the prosecutor "emphasized" the significance of the drug analysis certificates in his closing argument, *see* Petr.'s Br. 8, the prosecutor, in fact, referred to the certificates only twice, and then only briefly. *See* J.A. 48-58. He noted that the 4 bags of cocaine seized from Wright had been "analyzed as such" and, even more indirectly, that the cocaine recovered from the backseat area of the cruiser weighed 22.16 grams. J.A. 50. Consistent with his strategy throughout trial, Petitioner failed to object to these fleeting comments. *Id.*

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[3]Relying on a public records response that is not part of the state-court record, Petitioner states that the Department's laboratory is not accredited by any external organization. *See* Petr.'s Br. at 6 & n.1. But, neither SWGDRUG nor any other professional association requires accreditation for drug analysis. *See* Brief of Amici Curiae National Association of Criminal Defense Lawyers, et al. ("Amici NACDL Br.") at 8. Instead, any accreditation is purely voluntary.

The judge instructed the jury that, in considering whether Petitioner was guilty of trafficking in cocaine, the drug analysis certificates should be considered "with all other evidence in deciding whether or not the Commonwealth ha[d] met its burden of proving that this was, in fact, cocaine." J.A. 59. The judge cautioned, however, that "from that certificate of analysis *you're permitted but you're not required to conclude that the substance was cocaine. It is entirely up to you to decide.*" *Id.* (emphasis added). Shortly thereafter, the judge provided a substantively similar instruction in connection with the distribution charge. J.A. 61. The jury convicted Petitioner on both counts. App. at 1a.

4. On appeal, Petitioner argued that admission of the drug analysis certificates was contrary to *Crawford v. Washington*, 541 U.S. 36 (2004). *Id.* The Massachusetts Appeals Court rejected this argument because the state's highest court previously held that "certificates of drug analysis did not deny a defendant the right of confrontation and were, therefore, not subject to the holding in *Crawford*. . . ." *Id.* at 8a n.3 (citing *Verde*, 827 N.E.2d at 705).

In *Verde*, the Massachusetts Supreme Judicial Court explained that drug analysis certificates had "very little kinship to the type of hearsay the confrontation clause intended to exclude, absent an opportunity for cross-examination." *Verde*, 827 N.E.2d at 706. Instead, certificates were "well within the public records exception to the

confrontation clause" and akin to the types of business records that *Crawford* "stated [were] not testimonial in nature." *Id.* at 705-06.

## SUMMARY OF ARGUMENT

A. The vast majority of courts have correctly concluded that laboratory reports, like the drug analysis certificates here, are nontestimonial and, thus, not subject to the Confrontation Clause. These reports differ from the types of testimonial statements this Court has held are the Confrontation Clause's core concern in two significant respects.

First, they are not accusatory. The history and purpose of the Confrontation Clause establish that its focus is on out-of-court statements accusing the person now on trial, *i.e.*, "the accused," of having engaged in criminal wrongdoing. This accusatory focus is reflected in the Sixth Amendment's text and all of the Court's prior Confrontation Clause decisions. It is decidedly lacking here because drug analysis certificates do not accuse anyone of anything criminal; instead, they merely establish the current physical composition and weight of a chemical substance. These neutral, objective facts become inculpatory only when a testifying witness, who is properly subject to confrontation, provides the necessary evidentiary links to connect the substance tested in the laboratory to the accused's past criminal conduct.

Second, drug analysis certificates do not implicate the "principal evil" the Confrontation Clause was designed to avoid: the "use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. The Clause prohibits the government's use of hearsay statements documenting a witness's subjective observations of a defendant's past criminal conduct. Those concerns are inapplicable where, as here, the hearsay statement is not the product of any official examination and merely reports the results of objective, and largely mechanical, scientific testing performed by a state laboratory as required by law.

B. Admission of drug analysis certificates without live testimony is further supported by the common law's treatment of official and business records, including coroner's reports. In *Crawford*, the Court indicated that because these exceptions were established at the time of the founding and were nontestimonial by nature, no confrontation right attached to the admission of these records. *See Crawford*, 541 U.S. at 54, 56.

Drug analysis certificates are well within the common law official records exception because they are prepared by state officials pursuant to a duty imposed by law. In addition, the certificates are akin to types of business records generally admissible at common law because they are prepared in the ordinary course of the laboratory's day-to-day business. *Id.*

The treatment of coroners' reports at common law is illustrative. Like a coroner's report, which sets forth the coroner's findings about the physical condition of a decedent's body, a drug analysis certificate reports the analyst's findings about the physical state of a chemical substance. A coroner's findings about the physical condition of the body did not trigger confrontation rights at common law, and the same should hold true for an analyst's findings about the physical state of a chemical substance.

C. Even if the drug analysis certificates were deemed testimonial, no confrontation violation exists here because Petitioner had multiple opportunities to challenge the validity of the certificates and cross-examine the analysts, but strategically elected not to do so. An absolute rule requiring live testimony in every case where drug analysis is performed would be particularly nonsensical given that in the vast majority of drug cases – Petitioner's included – the test results are not even contested. Compulsory process and other available state-law procedures are fully adequate to ensure that those defendants who genuinely desire to challenge the validity of test results may do so, with only minimal burden.

D. In all events, if admission of the drug analysis certificates without live testimony be held to have violated Petitioner's confrontation rights, the state courts should be permitted to determine in the first instance whether the error was harmless beyond a reasonable doubt. A remand on this limited basis is amply supported by the record.

## ARGUMENT

The "vast majority" of courts have concluded, like the Massachusetts courts here, that laboratory reports are nontestimonial. *See* M. Graham, *Crawford/Davis "Testimonial" Interpreted, Removing the Clutter; Application Summary*, 62 U. Miami L. Rev. 811, 836 (2008).[4] Although no single rationale has been adopted, the emerging consensus

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[4]*See, e.g., United States v. De La Cruz*, 514 F.3d 121, 133-34 (1st Cir.) (autopsy), *petition for cert. filed*, 77 U.S.L.W. 3009 (U.S. June 23, 2008) (No. 07-1602); *United States v. Feliz*, 467 F.3d 227, 237 (2d Cir. 2006) (autopsy), *cert. denied*, 127 S. Ct. 1323 (2007); *United States v. Washington*, 498 F.3d 225, 229-30 (4th Cir.) (drug-alcohol analysis), *petition for cert. filed*, No. 07-8291 (U.S. Dec. 14, 2007); *United States v. Ellis*, 460 F.3d 920, 926-27 (7th Cir. 2006) (blood-urine); *Pruitt v. State*, 954 So.2d 611, 616 (Ala. Crim. App. 2006) (marijuana and cocaine); *People v. Geier*, 161 P.3d 104, 140 (Cal.) (DNA), *petition for cert. filed*, No. 07-7770 (U.S. Nov. 14, 2007); *People v. Johnson*, 18 Cal. Rptr. 3d 230, 233 (Cal. Ct. App. 2004) (cocaine); *State v. Musser*, 721 N.W.2d 734, 753-54 (Iowa 2006) (HIV); *Verde*, 827 N.E.2d at 706 (cocaine); *State v. O'Maley*, 932 A.2d 1, 13-14 (N.H.) (blood alcohol), *petition for cert. filed*, No. 07-7577 (U.S. Nov. 7, 2007); *State* v. *Dedman*, 102 P.3d 628, 636 (N.M. 2004) (blood alcohol); *People v. Rawlins*, 884 N.E.2d 1019, 1035 (N.Y.) (DNA), *petition for cert. filed*, No. 07-10845 (U.S. May 9, 2008); *State v. Forte*, 629 S.E.2d 137, 143 (N.C.) (DNA), *cert. denied*, 127 S. Ct. 557 (2006); *State v. Cao*, 626 S.E.2d 301, 305 (N.C. Ct. App. 2006) (cocaine); *State v. Crager*, 879 N.E.2d 745, 754 (Ohio 2007) (DNA), *petition for cert. filed*, No. 07-10191 (U.S. Mar. 26, 2008); *State v. Craig*, 853 N.E.2d 621, 638 (Ohio 2006) (autopsy), *cert. denied*, 127 S. Ct. 1374 (2007); *State v. Malott*, Nos. 2007-02-006-8, 2008 WL 1932428, at *2 (Ohio Ct. App. May 5, 2008) (cocaine); *State v. Cutro*, 618 S.E.2d 890, 896 (S.C. 2005) (autopsy); *Campos v. State*, 256 S.W.3d 757, 762-66 (Tex. Ct. App. 2008) (autopsy and DNA); *Denoso v. State*, 156 S.W.3d 166, 180-82 (Tex. Ct. App. 2005) (autopsy).

is that laboratory reports differ in two important respects from the sort of testimonial statements the Confrontation Clause was designed to address. First, laboratory reports do not accuse any individual of criminal conduct but merely record the results of objective, scientific testing. Second, laboratory reports do not implicate the historic evil the Confrontation Clause was designed to prevent but, instead, are prepared by state officials in the regular course of the laboratory's business pursuant to a duty imposed by law. *See* Part A *infra*. In this respect, laboratory reports are precisely the sort of official or business records that were admissible without confrontation at the time of the founding. *See* Part B *infra*. And, even if these records were deemed testimonial, here Massachusetts law afforded Petitioner ample alternative means for obtaining cross-examination, without resort to an absolute rule requiring the needless production of live testimony in every case where drug analysis is presented. *See* Part C *infra*.

### A. Drug analysis certificates are nontestimonial and do not implicate the principal evil the Confrontation Clause was intended to prevent.

The Sixth Amendment secures a criminal defendant's right to confront "the witnesses against him." U.S. Const. amend. VI. The Court has consistently rejected an absolutist reading of this language as covering every possible statement that might be relevant to a criminal case. *See, e.g., Davis v. Washington*, 547 U.S. 813, 821 (2006); *Idaho v. Wright*, 497 U.S. 805, 813 (1990). Rather, to define

the core meaning and reach of the Confrontation Clause, the Court has looked to the history surrounding its adoption. *Crawford*, 541 U.S. at 43-50.

Based on this historical record, the Court concluded that the "principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. . . ." *Id.* at 50. It stressed that the "Sixth Amendment must be interpreted with this focus in mind[,]" and that the Confrontation Clause reflects an "especially acute concern with a specific type of out-of-court statement." *Id.* That concern is "[o]nly" with "testimonial" statements that cause a declarant to be a witness against the accused. *Davis,* 547 U.S. at 814, 821; *see also White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring) (the Confrontation Clause was aimed "only" at a "discrete category" of "formalized testimonial materials" and should "not be construed to extend beyond the historical evil to which it was directed").

The Court has declined to "spell out a comprehensive definition of 'testimonial,'" *Crawford*, 541 U.S. at 68, or "produce an exhaustive classification of all conceivable [testimonial] statements" subject to confrontation. *Davis*, 547 U.S. at 822. But, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 541 U.S. at 68. It is these "modern practices," the

Court explained, that have the "closest kinship to the abuses at which the Confrontation Clause was directed." *Id.*

In *Davis*, the Court elaborated that a statement is "testimonial" when its "purpose . . . [is] to nail down the truth about past criminal events." *Davis*, 547 U.S. at 830. Where, in contrast, a statement describes current events and is made to obtain emergency or medical assistance, the statement is nontestimonial. *See id.* at 827-30.

*Crawford* and *Davis*, therefore, counsel that the determination of whether a particular statement is testimonial and, thus, subject to confrontation is highly dependent on the context in which the statement was made. Although the relevant factors may vary depending on the particular circumstances involved, two factors are controlling here: drug analysis certificates are neither accusatory nor prepared in a manner resembling the historic evil the Confrontation Clause was designed to avoid. *See Rawlins*, 884 N.E.2d at 1033.

1. **Drug analysis certificates are nontestimonial because they merely establish the physical nature of a substance and do not accuse anyone of wrongdoing.**

Drug analysis certificates like the ones introduced in Petitioner's trial merely attest to the chemical composition and weight of physical evidence. These facts are entirely neutral and do not

directly accuse anyone of any criminal conduct. The source of the accusation against the defendant is not the analyst, but other witnesses who testify about the historical facts linking the substance that was tested in the laboratory to the person now on trial. Confrontation is required for these accusers, but not for the analyst, who makes no accusation at all.

Although *Crawford* did not expressly state that the distinction between a testimonial and nontestimonial statement turns on whether the statement is accusatory, that condition is implicit in the Court's decision. The Court referred repeatedly to the right of the accused to confront his accusers.[5] In addition, in explaining the "principal evil" the Confrontation Clause was intended to avoid, the Court quoted an early treatise on criminal law, which described the Confrontation Clause's origins in unmistakably accusation-based terms: "The proof [in criminal trials under early English law] was usually given by reading depositions, confessions of accomplices, letters, and the like; and this

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[5] *See, e.g., Crawford*, 541 U.S. at 43 ("The right to confront one's *accusers* is a concept that dates back to Roman times.") (emphasis added); *id.* at 44 ("Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear . . . 'Call my *accuser* before my face. . . .'") (emphasis added); *id.* at 47 ("Early in the 18th century, . . . the Virginia Counsel protested against the Governor for having 'privately issued several commissions to examine witnesses against particular men *ex parte*,' complaining that 'the person accused is not admitted to be confronted with, or defend himself against his defamers.'"); *id.* at 51 ("An accuser who makes a formal statement to government officers bears testimony. . . .").

occasioned frequent demands by the prisoner to have his *'accusers,' i.e., the witnesses against him*, brought before him face to face. . . ." 1 J. Stephen, *History of the Criminal Law of England* 326 (1883) (quoted in *Crawford*, 541 U.S. at 43) (emphasis added).

The Sixth Amendment's text itself supports an accusation-based focus. As one respected commentator has observed: the "modified repetition of the word *accused* [in the Sixth Amendment's speedy trial, right to counsel, confrontation, and compulsory process clauses] strongly confirms that the Sixth Amendment as a whole is *accusation-based*." A. Amar, *The Constitution and Criminal Procedure First Principles* 102-03 (1997) (emphasis in original). This same focus is reflected in the Confrontation Clause's text, which refers specifically to "witnesses against" the accused, not any "witness with relevant testimony."

The limited history surrounding adoption of the Confrontation Clause provides further support for an accusation-based focus.[6] By inserting the phrase "witnesses against him" in the final version of the Clause, the Framers "intended to permit the defendant to confront both all those who in fact

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[6] *Cf. White*, 502 U.S. at 359 (Thomas, J., concurring) ("[t]here is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean"); *California v. Green*, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause comes to us on faded parchment.").

testified (witnesses) and also those who had made accusations against the defendant upon which the prosecution depended (accusers)." R. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. Ill. L. Rev. 691, 748 (1993); *see also* R. Jonakait, *"Witnesses" in the Confrontation Clause: Crawford v. Washington, Noah Webster, and Compulsory Process*, 79 Temp. L. Rev. 155, 181 (2006) (same); 30 C Wright & K. Graham, *Federal Practice and Procedure* § 6347 at 764 (1997) (same). In other words, "all witnesses who testify are subject to the clause." R. Mosteller, 1993 U. Ill. L. Rev. at 749. But, not all declarants whose out-of-court statements are offered against a defendant are "witnesses against him," because that status is limited to those who make accusations against the accused. *Id.*; K. Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 Ohio St. J. Crim. L. 209, 220 (2005) ("[T]he Founders wanted a right to confront not only the 'witnesses' who appeared at trial but the 'accusers' who lurked in the shadows.").

The Court's pre-*Crawford* Confrontation Clause decisions reflect this same focus on out-of-court accusations. In *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988), for instance, the Court stressed that the Confrontation Clause's focus is on forcing accusers to deliver their charges against the accused face-to-face. Shakespeare, the Court noted, was "describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence – face to face, and frowning brow to brow, ourselves will hear the accuser and the accused

freely speak. . . .'" *Id.* (citation omitted); *see also id.* at 1026 (Blackmun, J., dissenting; emphasis added) ("the essence of the right protected is the right to be shown that the *accuser* is real and the right to probe *accuser* and *accusation* in front of the trier of fact"). Similarly, in *Lee v. Illinois*, 476 U.S. 530, 540 (1986), the Court held that the Confrontation Clause's core purpose is to "promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial." The Confrontation Clause advances this goal, the Court explained, "by ensuring that convictions will not be based on the charges of unseen and unknown – and hence unchallengeable – individuals." *Id.*; *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 71 (1987) (Brennan, J., dissenting; emphasis in original) ("The right of a defendant to confront an accuser is intended fundamentally to provide an opportunity to subject *accusations* to critical scrutiny.").

The Court's prior decisions, therefore, establish that the only "charges" the Confrontation Clause was intended to guard against are out-of-court accusations that the person now on trial – "the accused" – committed a crime. *See* M. Graham, *Handbook of Federal Evidence*, § 802:2.2 (6th ed. Supp. 2008) (quoting *Webster's* definition of "accusation" as a "charge of wrongdoing, delinquency, or fault; the declaration containing such a charge"). In fact, all of the cases in which the Court has found a Confrontation Clause violation

involved just such paradigmatic accusatory statements.[7]

This interpretation of the Confrontation Clause is supported by decisions reached by an increasing number of state appellate courts, which have utilized a similar accusation-based focus in determining whether a particular out-of-court statement is testimonial or nontestimonial. *See, e.g., Rawlins*, 884 N.E.2d at 1026 ("*ex parte accusatory* statements" are the "common nucleus" in *Crawford*'s various formulations of testimonial evidence); *Michels v. Commonwealth*, 624 S.E.2d 675, 678 (Va. Ct. App. 2006) ("the Confrontation Clause is aimed at protecting criminal defendants from those people making accusations against them"). Decisions from federal appeals courts support this focus as well. The Second Circuit, for instance, has succinctly

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[7] *See e.g., Crawford*, 541 U.S. at 40 (wife's statement rebutted husband's claim that stabbing was in self-defense); *Lilly v. Virginia*, 527 U.S. 116, 121 (1999) (accomplice's confession accused defendant of stealing guns during a robbery and using one of the guns to shoot victim); *Williamson v. United States*, 512 U.S. 594, 596 (1994) (accomplice's confession identified defendant as the "owner" of the cocaine he was charged with possessing); *Wright*, 497 U.S. at 809-11 (child victim accused petitioner of sexual abuse); *Lee*, 476 U.S. at 532-35 (nontestifying codefendant's confession accused defendant of playing leading role in double murder); *Bruton v. United States*, 391 U.S. 123, 124 (1968) (nontestifying codefendant's confession accused defendant of participating in armed robbery); *Douglas v. Alabama*, 380 U.S. 415, 417 (1965) (accomplice's confession accused defendant of being the person who fired shotgun); *Pointer v. Texas*, 380 U.S. 400, 401 (1965) (victim's statement identified defendant as the man who robbed him at gunpoint).

stated that "[t]he Confrontation Clause targets only that testimony that contains accusations against the defendant." *Ryan v. Miller*, 303 F.3d 231, 247 (2d Cir. 2002); *see also United States v. Beasley*, 438 F.2d 1279, 1281 (6th Cir.) (no right to confront fingerprint technician who did not accuse defendant of anything), *cert. denied*, 404 U.S. 866 (1971).

Scholarly commentators likewise agree that both the text and history of the Confrontation Clause support an accusation-based focus in determining whether a statement is testimonial.[8] Even some of the amici law professors, who have submitted a brief in support of Petitioner, acknowledge that the Confrontation Clause's history and purpose support an accusation-based focus.[9]

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[8] *See, e.g.*, M. Graham, 62 U. Miami L. Rev. at 829 ("The 'charge of wrongdoing' that the Confrontation Clause was designed to curb is an out-of-court declaration charging the accused . . . of having committed a crime."); 30A C. Wright & K. Graham, *Federal Practice and Procedure* § 6371.3 (Supp. 2007) (an accusation-based focus is "historically correct"); A. Torchin, *A Multidimensional Framework for the Analysis of Testimonial Hearsay under Crawford v. Washington*, 94 Geo. L. J. 581, 591 (2006) ("the Confrontation Clause is directed at a more specific type of testimonial hearsay – that of an accusatory witness"); T. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. Fla. L. Rev. 863, 870-71 (1988) ("only witnesses who make statements that are directed against the defendant and that accuse him or her of wrongdoing must confront the defendant").

[9] *See, e.g.*, J. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y, 791, 848 (2007) ("[l]imiting the Confrontation Clause's operation to accusations . . . would not be inconsistent with the principles that underlie *Crawford*"); R. Mosteller, 1993 U. Ill. L.

A drug analysis certificate bears no resemblance to the types of accusations that historically have been the "core concern of the Confrontation Clause." *See* 30A C. Wright & K. Graham, *Federal Practice and Procedure* § 6371.2. An accusation "typically focuses" on historical facts, explaining "when, where, why, how, with whom, to whom, and so on." A. Amar, *Sixth Amendment First Principles*, 84 Geo. L. J. 641, 688 (1996); *see also Davis*, 547 U.S. at 822, 827-28 (statements "describing past events" are testimonial). Chemists who prepare drug analysis certificates have no knowledge of these historical facts. *See* M. Graham, 62 U. Miami L. Rev. at 837. Their job, instead, is to study the current physical state of a substance, confirming both its chemical composition and weight. *See* B. Morin, *Science, Crawford, and Testimonial Hearsay: Applying the Confrontation Clause to Laboratory Reports*, 85 B.U. L. Rev. 1243, 1258 (2005) (analysts study "faceless samples of physical evidence"). The certificates they prepare reflect only these objective or neutral facts. *See, e.g., O'Maley*, 932 A.2d at 14; *Rawlins*, 884 N.E.2d at 1031. They do not charge anyone with past criminal conduct and, thus, are not accusatory. *See Geier*, 161 P.3d at 140 ("'Records of laboratory protocols

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Rev. at 751 ("Limiting the clause to apply to those making accusations can be supported by the text and does not appear inconsistent with history."); R. Mosteller, *"Testimonial" and the Formalistic Definition –The Case for an "Accusatorial" Fix*, 20 Crim. Just. 14, 16-17 (2005) (history and purpose of the Confrontation Clause support an accusatorial focus).

followed and the resulting raw data acquired are not accusatory.'") (quoting *Forte*, 629 S.E.2d at 143).

The statements contained in drug analysis certificates become incriminating only when other witnesses subsequently link the substances that were tested to the particular charges against the accused. The Court, however, has distinguished between statements that are "'incriminating on [their] face'" and those that become so "'only when linked with evidence introduced later at trial.'" *Gray v. Maryland*, 523 U.S. 185, 191 (1998) (quoting *Richardson v. Marsh*, 481 U.S. 200, 208 (1987)). Confrontation is required for the former but not the latter. *Id.*

In this case, Detective Pieroway was the principal witness who established that the cocaine tested in the laboratory was, in fact, the same cocaine that Petitioner was accused of trafficking and distributing. Pieroway — not the lab analysts — provided the historical facts linking Petitioner to the crimes by supplying the jury with answers to the questions "when, where, why, how, with whom, to whom, and so on." *See* A. Amar, 84 Geo. L. J. at 688. Pieroway, of course, testified at trial and, thus, was subject to cross-examination. The Confrontation Clause requires nothing more. *See, e.g., Geier*, 161 P.3d at 140 ("the accusatory opinions in this case – that defendant's DNA matched that taken from the victim's vagina . . . were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness").

*California v. Trombetta,* 467 U.S. 479, 490 (1984) – a case cited by Petitioner – is in full accord. *See* Petr.'s Br. at 12. There, the police officer personally administered an Intoxilyzer breath test to a suspected drunk driver. *Trombetta*, 467 U.S. at 482. The breath test established that, at the time of his arrest, defendant had a blood-alcohol level over the legal limit. *Id.* Unlike the lab analysts here, the police officer in *Trombetta* did not merely report the results of a neutral scientific test but, instead, provided affirmative testimony linking those test results to an identified accused. *See id.* at 482, 490. Because the officer was an accusatory witness in every sense of the term, confrontation was properly required. *See id.* The same cannot be said here.

Petitioner nonetheless contends that *Crawford* and *Davis* establish a bright-line rule that any formal statement, including a drug analysis certificate, prepared for use at trial is testimonial and, therefore, subject to the Confrontation Clause. Petr.'s Br. at 10-12. He relies on a passage from *Crawford* noting that one possible formulation of "testimonial" comprises statements "made under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial." *Crawford*, 541 U.S. at 51-52 (quoting amicus brief for the National Association of Criminal Defense Lawyers).

Petitioner stretches the analysis from *Davis* and *Crawford* too far. In *Davis*, the Court focused on the "primary purpose" of a statement (whether it was to report an ongoing emergency or describe past

criminal conduct) to determine if the declarant was a "witness." *Davis*, 547 U.S. at 828. It concluded that "no 'witness' goes into court to proclaim an emergency and seek help." *Id.*

But, just being a "witness" does not automatically render the person a "witness against" the defendant for purposes of the Confrontation Clause. *See Maryland v. Craig*, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting) (not every person "who knows or sees anything" is a witness within the meaning of the Confrontation Clause). The Court had no occasion to assess the full reach of the phrase "witness against" in *Davis* and its companion case, *Hammon*. In *Davis*, the 911 caller was describing events as they actually happened to seek emergency help and was therefore not a "witness" at all, *Davis*, 547 U.S. at 828; while in *Hammon*, the declarant told police about past events that directly accused her husband of a violent assault, *id.* at 820-21, 829-30. Similarly, *Crawford* involved historical, accusatory statements by a wife to police that "implicated her husband in Lee's stabbing and at least arguably undermined his self-defense claim." *Crawford*, 541 U.S. at 65. Thus, nothing in *Davis* or *Crawford* supports the conclusion that the possible use of a non-accusatory out-of-court statement at trial automatically makes the declarant a "witness against" the accused.

If anything, *Davis* "confirms that the proper focus [about whether an out-of-court statement is subject to confrontation] is not on the mere reasonable chance that an out-of-court statement

might later be used in a criminal trial." *Geier*, 161 P.3d at 139. As the Seventh Circuit explained: "it cannot be that a statement is testimonial in every case where a declarant reasonably expects that it might be used prosecutorially." *Ellis*, 460 F.3d at 926. If this were the standard, the Court in *Davis* would have held that the 911 call from the victim reporting a domestic disturbance was subject to confrontation because a reasonable person would know that the result of such a call would be the arrest and prosecution of the perpetrator. *Id.*

There is, in short, a world of difference between a declarant who says: "I saw John Doe rob Mrs. Smith at gun point" and a declarant who merely says "I saw a blue car drive down the road." *See* Petr.'s Br. at 30 (positing this hypothetical). The former statement directly accuses an identifiable person of criminal conduct and, thus, implicates the Confrontation Clause's core purpose of preventing trials by anonymous accusers. *See Michels*, 624 S.E.2d at 680; M. Graham, 62 U. Miami L. Rev. at 829; K. Graham, 3 Ohio St. J. Crim. L. at 220-21. The latter statement, in contrast, is neutral on its face. It does not directly accuse any identifiable individual of any wrongdoing and, thus, raises no constitutional concerns. *See id.*; *see also Lilly*, 527 U.S. at 142 (Breyer, J., concurring) ("[i]t is not obvious" that the admission of a "scrawled note, 'Mary called,'" requires confrontation). Instead, the question of the latter statement's admissibility is properly resolved under traditional hearsay rules, not the Confrontation Clause. So too with a laboratory report that says simply the "substance is

cocaine." 30A C. Wright & K. Graham, *Federal Practice and Procedure* § 6371.2 at p.60.

**2. Drug analysis certificates are non-testimonial because they do not involve, and are not analogous to, *ex parte* examinations of witnesses – the principal evil the Confrontation Clause was designed to prevent.**

Drug analysis certificates also differ from traditional testimonial statements in another key respect: they are not prepared under any circumstances remotely implicating "the principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50. In *Crawford*, the Court identified that "principal evil" as the historical practice of government officials conducting *ex parte* examinations of witnesses, reducing the witnesses' out-of-court statements to writing, and then offering those written statements at trial as evidence against the accused. *See id.; see also Green*, 399 U.S. at 156 (the "particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates"). "The involvement of government officers in the production of [such] testimonial evidence presents the same risk, whether the officers are police or justices of the peace," *Crawford*, 541 U.S. at 53, because a "witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal." 3 W. Blackstone, *Commentaries on the*

*Laws of England* 373 (1786). In addition, there is the danger that "an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language." *Id.*

Those concerns are inapplicable where, as here, the out-of-court statements reflect the results of neutral, scientific testing performed by government officials pursuant to a statutory duty. *See* M. Graham, 62 U. Miami L. Rev. at 837. Confrontation violations arise where the prosecution seeks to use hearsay accounts from witnesses who observed past events – accounts that are not objectively verifiable and, thus, are inherently prone to distortion or manipulation. *See, e.g., Crawford*, 541 U.S. at 65 (in response to "often leading" police questioning wife "implicated her husband in Lee's stabbing"). The Clause was designed to prohibit the use of these second-hand hearsay accusations, not official or business records, which were recognized exceptions to confrontation at the time of the founding. *See* Part B *infra*.

Here, in keeping with duty imposed by state law, the analysts prepared the certificates in response a request submitted by the police. *See* Mass. Gen. Laws ch. 111, § 12. But, the scientific testing recorded on the certificates was not obtained through any sort of inquisitorial methods. There was no dialogue at all – formal, informal, or voluntary – between the police and the analysts, let alone any dialogue about Petitioner's role in the crime. *Cf. Davis*, 547 U.S. at 822 & n.1, *Crawford*,

541 U.S. at 53 n.4; *Giles v. California*, 128 S. Ct. 2678, 2693 (2008) (Thomas, J., concurring). In fact, the certificates in this case did not refer to Petitioner at all. *See* App. at 24a-29a.

In addition, the testing results recorded on the certificates speak for themselves; unlike witness accounts, they cannot be, as Blackstone feared, "dress[ed] up" by police officers passing along hearsay testimony. *See Rawlins*, 884 N.E.2d at 1031 ("police or prosecutorial involvement is unlikely to have any impact on [scientific] test[] results"). Indeed, where chemical analysis is confirmed by mechanical testing such as GC/MS, the primary source of the statement is not even the analyst, but the machine itself. *See Washington*, 498 F.3d at 229-30. This is "[b]ecause once the sample was prepared and put . . . into the gas chromatograph for analysis, the entire testing procedure is done electronically or mechanically. The analyst no longer intervenes in the analytical process . . . and the results that were produced were produced by the instrument." *State v. Christian*, 895 P.2d 676, 683 (N.M. 1995). Thus, the certificates are not a "weaker substitute for live testimony." *See Davis*, 547 U.S. at 828; *see also Washington*, 498 F.2d at 229-30 (machine-generated data are not testimony).[10]

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[10]Although some interpretation of the machine-generated data ordinarily is required, *see* 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 23.03[c], "[a]ny competent chemist would infer from these data that the tested substance was cocaine." *United States v. Moon*, 512 F.3d 359, 362 (7th Cir.), *petition for cert. filed*, 76 U.S.L.W. 3557 (U.S. Apr. 2, 2008) (No. 07-1251).

Like Blackstone, this Court has emphasized that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Coy*, 487 U.S. at 1017 (internal citation omitted). When a witness accuses a defendant of criminal wrongdoing, confrontation may cause an accuser to "feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts." *Id.* at 1019 (quoting Z. Chafee, *The Blessings of Liberty* 35 (1956)). But, one would not reasonably expect a laboratory professional – required by law to perform a largely mechanical, scientific test on a chemical substance – to "feel quite differently" about the results of his scientific test by having to look at the defendant. *See Rawlins*, 884 N.E.2d at 1031. An analyst is, and should be, focused only on the chemical substance he is duty-bound to test, not any individual defendant. Neither the long history behind the Confrontation Clause nor its animating principles support its application to this type of objective, scientific testing. [11]

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[11]The cases involving the use of fabricated scientific evidence, as chronicled in the National Innocence Network's amicus brief, are deplorable. But, it is a fallacy to impugn all scientists based on the isolated misdeeds of a few, however inexcusable the actions of those few may be. Furthermore, the Due Process Clause provides a sufficient deterrent and remedy against the use of any such fabricated evidence. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959). An expansion of the Confrontation Clause beyond its core purposes is not warranted.

### 3. The Court's decisions do not support Petitioner's overbroad interpretation of the Confrontation Clause.

Petitioner offers several formulations that stretch the Confrontation Clause's scope well beyond this Court's decisions or the Clause's historical roots. First, he argues that the Clause applies to any statement likely to be used in a criminal trial, *see* Petr.'s Br. at 10-11, a view that lacks support in *Davis* and *Crawford*. *See* Part A(1) *supra*.

Next, he selectively quotes part of a passage from *Cruz v. New York*, 481 U.S. 186, 190 (1987), to claim that the Confrontation Clause is not limited to accusatory witnesses but, rather, extends to any witness whose "testimony is part of the body of evidence that the jury may consider in assessing [the accused's] guilt." *See* Petr.'s Br. at 30. But, the Court's statement in *Cruz* was made in the context of a nontestifying codefendant's powerfully incriminating confession admitted at a joint trial. *See Cruz*, 481 U.S. at 190. Even though the jury was instructed to consider the confession only as evidence against the declarant, and not against the accused, the confession nevertheless was among the most devastating types of out-of-court accusations that could be offered against a defendant in a criminal trial. *Id.* *Cruz*, therefore, is not a departure from the Confrontation Clause's historical accusation-based focus. If *Cruz* had established such a sweeping rule applying to any witness whose statements are offered at trial, this Court's entire

opinion in *Crawford* would have been unnecessary. *See Crawford*, 541 U.S. at 42-43.

Petitioner suggests, alternatively, that confrontation rights attach to any statements that establish an element of the offense, relying on *Kirby v. United States*, 174 U.S. 47 (1899). *See* Petr.'s Br. at 17. There, the defendant was charged with receipt of stolen property. To prove that the property was, in fact, stolen, the prosecution offered the record of conviction obtained in a separate proceeding against the three individuals accused of stealing the property. Kirby, however, was not a party to this prior proceeding, and the Court held that the record was not properly admitted against him. *Kirby*, 174 U.S. at 54-55. Justice Harlan later explained that it was "not a confrontation case at all, but a matter of the substantive law of judgments." *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring). "Indeed, the *Kirby* Court indicated that lack of confrontation was not at the heart of its objection when it said that the record would have been competent evidence of the fact of conviction" had Kirby been a party to the prior proceeding. *Id.* at 98-99; *Kirby*, 174 U.S. at 54, 59.[12]

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[12]Records of prior conviction are routinely admitted in criminal cases where the defendant is the same person named in the record, even when that record is used to establish an element of the offense. *See, e.g., State v. King*, 146 P.3d 1274, 1279 (Ariz. Ct. App. 2006) (record of conviction used to establish second and subsequent DUI offense; collecting cases from other jurisdictions). Records of prior conviction, of course, are just one example of the types of official and business records that are not testimonial and were common law exceptions to confrontation. *See* Part B *infra*.

Furthermore, even if *Kirby* was properly viewed as a confrontation case, it is inapposite. The statute there made a record of conviction obtained against a principal accused of stealing government property "conclusive evidence" in a separate prosecution against the alleged receiver that the property was, in fact, stolen. *Kirby,* 174 U.S. at 48. But, as the Court noted, a record of conviction establishes only that the person named in the record was convicted. *Id.* at 60. That fact, however, "was not necessary to be established in the case against the alleged receiver." *Id.* Because the government failed to offer any other evidence proving that the property was, in fact, stolen, the Court reversed Kirby's conviction. *Id.* at 58-61. Nothing remotely similar is at issue here.

Ultimately, Petitioner's effort to craft some type of a broad bright-line rule based on a statement's possible use at trial strays too far from the historical approach dictated by *Crawford.*[13] The Court has resisted endorsing likely use at trial or any other specific formulation of what is a

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[13]Petitioner also seeks to derive support from *dicta* contained in *Diaz v. United States*, 223 U.S. 442, 451-53 (1912) and *United States v. Wade*, 388 U.S. 218, 228 (1967). *See* Petr.'s Br. at 3, 12-13. Those cases were decided long before *Crawford* and did not address, directly or indirectly, the testimonial or nontestimonial nature of laboratory reports. Although the Court in both cases made passing reference to a defendant's ability to confront the authors of an autopsy or other type of scientific report at trial, Petitioner properly characterizes those comments as mere "general" assumptions, not pertinent holdings. *See* Petr.'s Br. at 3.

testimonial statement. *Davis*, 547 U.S. at 822. Indeed, *Crawford*'s historical approach left open the possibility that the Sixth Amendment might not cover "testimonial" dying declarations even when made to government officials for possible use at trial. *Crawford*, 541 U.S. at 55-56 & n.6.

As in *Crawford* and *Davis*, the Court here need not delineate the complete, precise boundaries of the Confrontation Clause. It is enough to conclude that the drug analysis certificates admitted at trial do not constitute accusatory evidence against the Petitioner, and that they were not obtained through methods or under circumstances resembling the *ex parte* examinations that the Confrontation Clause was intended to preclude. Even though the certificates were prepared for possible use in a criminal trial, they are not "testimonial" evidence that triggers confrontation rights.

**B. Drug analysis certificates are akin to the types of official and business records admissible at common law, including coroner's reports about the physical condition of a body.**

The admission of drug analysis certificates without live witness testimony also is supported by the common law treatment of official and business records, including coroner's reports about the physical condition of a decedent's body. In *Crawford*, the Court stated that "[m]ost of the hearsay exceptions [established at the time of the founding] covered statements that by their nature were not testimonial – for example, business records. . . ."

*Crawford*, 541 U.S. at 56. Additionally, Chief Justice Rehnquist, in his concurring opinion, confirmed that "the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official records. . . . To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process." *Id.* at 76 (Rehnquist, C.J., concurring).

1. **The common law official records exception covered all records made pursuant to a duty imposed by law.**

At common law, official records were an exception to confrontation and, thus, were admissible without calling the official who made the record. *See Heike v. United States*, 192 F. 83, 95 (2d Cir. 1911) (official records are "admissible without calling the persons who made them, and have been so admissible from a time anterior to the adoption of the Constitution"), *aff'd*, 227 U.S. 131 (1913); *Verde*, 827 N.E.2d at 705 ("One acknowledged exception to the confrontation clause is a public record, 'an ancient principle of the common law recognized at the time of the adoption of the Constitution.'") (quoting *Commonwealth v. Slavski*, 140 N.E. 465, 468 (Mass. 1923)); *State v. Dowdy*, 58 S.E. 1002, 1004 (N.C. 1907) (admission of "official certificates" was an exception to confrontation at time of founding); 1 T. Cooley, *Treatise on Constitutional Limitations* 666 (8th ed. 1927) (same). Most of the leading evidence treatises from the founding era recognized the official records exception. *See, e.g.*, T.

Peake, *Compendium of the Law of Evidence* 83 (5th ed. 1822); 1 J. Chitty, *Practical Treatise on the Criminal Law* 575-76 (2d ed. 1826); 1 T. Starkie, *Practical Treatise on the Law of Evidence* 177 (1826); *see also* 5 J. Wigmore, *Evidence in Trials at Common Law* § 1398 (Chadbourn ed. 1974) (same).

Official records were admissible at common law in a wide variety of cases on the ground that the act was being done pursuant to a public duty or for a public purpose and, as such, was "entitled to a degree of credit to which no act of an individual is." T. Peake, *Law of Evidence* at 83. "Certificates, and other documents made by persons intrusted with authority for the purpose," therefore, qualified as official records at common law, and were "evidence against all, to the extent of the officer's authority, of the facts which he is directed to certify." 1 T. Starkie, *Law of Evidence* at 172. Consistent with this broad exception, "'a record of a primary fact made by a public officer in the performance of official duty is . . . competent prima facie evidence as to the existence of that fact.'" *Verde*, 827 N.E.2d at 705 (quoting *Slavski*, 140 N.E. at 469); 1 T. Cooley, *Treatise on Constitutional Limitations* at 666 (same).

A leading English criminal case, decided shortly before the Bill of Rights was adopted, explained the theory behind the official records exception in similar terms:

> The law reposes such a confidence in public officers that it presumes that they

> will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence and shall be taken to be true.

*The King v. Aickles,* 168 Eng. Rep. 297, 298 (1785). There, Aickles was prosecuted for returning from transportation before the time for his exile on a prior sentence had elapsed. To prove the date of his discharge from prison, the court allowed the prosecutor to admit a log book maintained by prison officials pursuant to their official duty. *Id.*

As *Aickles* demonstrates, the common law official records exception applied to criminal cases. *See* 1 Chitty, *Criminal Law* at 575-76; 4 W. Hawkins, *Treatise on Pleas of the Crown* 430 (7th ed. 1795). Indeed, contrary to Petitioner's suggestion, *see* Petr.'s Br. at 29, evidence in common law criminal cases was "regulated by nearly the same principles as in civil cases." 2 Z. Swift, *System of the Laws of the State of Connecticut* 399 (1795); 4 W. Blackstone, *Commentaries on the Laws of England* 356 (1786) (same); 1 Chitty, *Criminal Law* at 555 (same); 1 J. Wigmore, *Evidence in Trials at Common Law* § 4(2) (Tillers ed. 1983) (same). *See also United States v. Johns*, 4 U.S. 412, 415 (1806) (copy of ship's manifest that custom-house officers were required to maintain was "clearly admissible" in criminal prosecution).

The only relevant limitation on the admissibility of official records recognized at

common law was that the public officer not have any "private interest" in the litigation. *See Aickles*, 168 Eng. Rep. at 298; L. MacNally, *Rules of Evidence on Pleas of the Crown* 475 (1802) ("books of public offices, and of public bodies, which of course are not interested in the event of the trial, are admissible evidence"). This limitation was consistent with the usual common law rule that "a man cannot make evidence for himself." 5 J. Wigmore, *Evidence* § 1518. It was intended to apply only where the official was shown to have some "special interest," giving him a "strong motive to misrepresent." *Id.* § 1633.

In all other cases, the common law generally favored admission of official records because of the "great probability" that a public official "does his duty and makes a correct statement," and the inconvenience that would result from having officials "devoting the greater part of their time to attending as witnesses in court. . . ." *Id.* §§ 1631-1632; *see also Schell v. Fauche*, 138 U.S. 562, 565 (1891) ("With regard to the conduct of a public office, the presumption is that everything is done properly, and according to the ordinary course of business. . . .").[14] In *Aickles*, for instance, the court stressed that the official had "no private interest whatsoever in [the record] to induce him to make fictitious entries in it.

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[14]Official records were admissible at common law even when the officials were not legally required to make the record so long as they did so "in the discharge of a public duty." *Evanston v. Gunn*, 99 U.S. 660, 666 (1878); 1 T. Starkie, *Law of Evidence* at 177 (citing *Aickles*, 168 Eng. Rep. at 298).

He is a public officer recording a public transaction." *Aickles,* 168 Eng. Rep. at 298.

The analysts who prepared the drug analysis certificates in this case (and countless other drug cases) likewise were acting in the ordinary course of their official business and had no private or special interest that would motivate them to "make fictitious entries" on the certificates they were statutorily compelled to prepare. Instead, pursuant to their official duty, they recorded the "results of a well-recognized scientific test determining the composition and quantity of the substance." *Verde,* 827 N.E.2d at 705. They had no interest or stake in the outcome of Petitioner's prosecution; their only interest was to faithfully discharge the duty imposed on them by law to accurately record the results of their scientific testing. *See* I. Stone, *Capabilities of Modern Forensic Laboratories,* 25 Wm. & Mary L. Rev. 659, 674 (1984) ("The forensic scientist does not serve as an advocate for the plaintiff, prosecution, or defendant; he serves as an advocate for an opinion or conclusion based on objective physical evidence.").

Indeed, analysts sometimes determine that the substances submitted for testing are not drugs at all. *See Verde,* 827 N.E.2d at 703; *see also Geier,* 161 P.3d at 140 (results of laboratory tests have the "power to exonerate as well as convict"). Of course, the information in the certificates often will support the prosecution's case against a defendant, as did the prison log book in *Aickles.* The certificates are, nonetheless, official records under the "ancient" common law principle because of the "special and

weighty duty" that the law imposes on the analysts to make an accurate record. *See* 5 J. Wigmore, *Evidence* § 1632; *see also* 1 T. Starkie, *Law of Evidence* at 172-73 ("For where the Law has appointed a person for a specific purpose, the Law must trust him as far as he acts under its authority."); G. Gilbert, *Law of Evidence* 19-20 (1801) (same).

Petitioner, however, seeks to impose an additional requirement on the common law rule: namely, that the official record not be prepared for potential use in litigation. *See* Petr.'s Br. at 21. But, none of the cases or treatises from the founding era imposed this particular limitation, and Petitioner provides no authority to show otherwise. The absence of any cases or treatises from the founding era imposing a similar "prepared for litigation" exception is a strong indication that no contrary interpretation of the Confrontation Clause was intended. *Cf. Giles*, 128 S. Ct. at 2684 (citing the absence of commentary from the founding era as evidence that no contrary interpretation of confrontation right was intended).

Furthermore, contrary to Petitioner's claim that courts historically did not treat laboratory reports as official records, over time courts have, in fact, rejected confrontation clause challenges to certificates of analysis similar to those at issue here, including when those certificates were prepared for use in criminal prosecutions. *See, e.g., Slavski*, 140 N.E. at 469 (alcohol analysis); *State v. Torello*, 131 A. 429, 430 (Conn. 1925) (same); *Bracey v.*

*Commonwealth*, 89 S.E. 144, 145 (Va. 1916) (same); *but see Torres v. State*, 18 S.W.2d 179, 180 (Tex. Crim. App. 1929).[15] Indeed, prior to the adoption of Fed. R. Evid. 803(8), most federal and state courts agreed that laboratory reports like those at issue here qualified as official records and, thus, were admissible without live testimony. *See* P. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L. J. 671, 673 (1988).[16]

Following adoption of the Federal Rules of Evidence, courts debated whether the limitation imposed by Rule 803(8)(B), which precludes "matters observed by police officers and other law enforcement personnel" from being admitted against defendants in criminal cases, applied to laboratory reports. *Compare United States v. Gilbert*, 774 F.2d 962, 965 (9th Cir. 1985) *with United States v. Oates*,

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[15]*See also Belford, Clarke & Co. v. Scribner*, 144 U.S. 488, 505-06 (1892) (certificate of the Librarian of Congress establishing date when new publication was received was "competent evidence" in copyright infringement action).

[16]*See, e.g., Beasley*, 438 F.2d at 1281 (fingerprints); *Kay v. United States*, 255 F.2d 476, 480-81 (4th Cir.) (blood alcohol), *cert. denied*, 358 U.S. 825 (1958); *Robertson v. Cox*, 320 F. Supp. 900, 900 (W.D. Va. 1970) (seminal fluid); *Commonwealth v. Harvard*, 253 N.E.2d 346, 352 (Mass. 1969) (marijuana); *State v. Snider*, 541 P.2d 1204, 1209 (Mont. 1975) (marijuana); *State v. Larochelle*, 297 A.2d 223, 225-26 (N.H. 1972) (breathalyzer); *Robertson v. Commonwealth*, 175 S.E.2d 260, 262 (Va. 1970) (seminal fluid); *State v. Kreck*, 542 P.2d 782, 786-88 & n.3 (Wash. 1975) (lab report establishing presence of chloroform in blood).

560 F.2d 45, 78-79 (2d Cir. 1977). The Advisory Committee's Notes to Rule 803(8) explain that "the reason for [this limitation] is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases."

But, those concerns are not at play with the type of scientific testing at issue here. As one commentator explained, "[i]n creating this [hearsay limitation] Congress was concerned with confrontation rights and the adversarial positions of the defendant and the policeman 'on the scene.' This relation does not exist with a chemist or someone with similar duties. He does not face the defendant and is not on the streets." J. Grant, *Trustworthiness Standard for the Public Records and Reports Hearsay Exception*, 12 W. St. U. L. Rev. 53, 78 (1984). The "factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present." *United States v. Quezada*, 754 F.2d 1190, 1194 (5th Cir. 1985).

An analyst in a state laboratory does not exercise any of the powers associated with traditional law enforcement personnel. *See* J. Grant, 12 W. St. U. L. Rev. at 78; *see also Dedman*, 102 P.3d at 635. Rather, the analyst is charged with recording routine, objective observations about the

physical condition of a substance, and reporting those findings as part of the every-day function of the laboratory. *See Rawlins*, 884 N.E.2d at 1035. These functions "differ[] significantly from that of the public officers whose actions or methodology implicated confrontation issues at common law." *State v. Norman*, 125 P.3d 15, 19 (Or. Ct. App. 2005). An analyst, in other words, simply has "no subjective interest in the test's outcome, and could hardly affect the result in any event. . . ." *Rawlins*, 884 N.E.2d at 1031. And, this is true regardless of whether the analyst knows that the test "was requested as a part of a criminal investigation and . . . might be used against a person accused of a crime." *Gilbert*, 774 F.2d at 965.

Petitioner's contrary argument is primarily derived from the minority approach adopted by the Second Circuit in *Oates*. There, the Court of Appeals held that a laboratory report identifying a substance as heroin was inadmissible under Fed. R. Evid. 803(8) because it constituted a factual finding made in connection with a law enforcement investigation. *Oates*, 560 F.2d at 67-68. *Oates*, however, has been "severely criticized" by other courts, including most other federal courts of appeal. *See Bohsancurt v. Eisenberg*, 129 P.3d 471, 481-82 (Ariz. 2006) (collecting state and federal cases); *Garcia v. Texas*, 833 S.W.2d 564, 568-69 (Tex. Ct. App. 1992) (same). Indeed, its reasoning "has been questioned by the very court rendering the decision in that case." *State v. Smith*, 323 S.E.2d 316, 327 (N.C. 1984); *see also United States v. Rosa*, 11 F.3d 315, 332-33 (2d Cir. 1993) ("Notwithstanding the breadth of certain

dicta in *Oates*," declining to apply Rule 803(8)(B)'s limitation to employees of a medical examiner's office), *cert. denied*, 511 U.S. 1042 (1994).

Furthermore, even if *Oates'* interpretation of Fed. R. Evid. 803(8)(B) were correct, it would not control resolution of the constitutional issue presented here. Interpretation of the Confrontation Clause is not governed by modern-day hearsay rules. *See Crawford*, 541 U.S. at 51. Rather, the Clause is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.* at 54. As shown above, drug analysis certificates are "well within" the common law official records exception and, thus, not subject to confrontation. *Verde*, 827 N.E.2d at 705.

**2. The common law business records exception was not limited to a party's shopbooks but extended to all regular entries.**

Drug analysis certificates also would be admissible under the common law business records exception. At common law, there were two separate branches to the business records exception. 5 J. Wigmore, *Evidence* § 1517. One branch was the "narrower" exception for a party's account or shopbooks referenced in Petitioner's brief. *See* Petr.'s Br. at 11, 20. The other branch was a "general exception in favor of regular entries made in the course of business." *Id.* Both branches share a "common origin," but the history of their

development in the United States was not identical. 5 J. Wigmore, *Evidence* §§ 1517-1518.

Statutes allowing a party's shopbooks to be admitted in evidence were in place in most of the Colonies, including Massachusetts, and, thus, firmly established at the time of the founding. *See id.* § 1518. The historical record is less clear about precisely when the general exception for regular entries gained acceptance in United States. *Id.* The most that can be said is that there are no reported decisions applying that branch of the common law rule in the United States until 1819. *See id.* (citing *Welsh v. Barrett*, 15 Mass. 380, 385 (1819)).

Nevertheless, the Framers were surely aware of the regular entries branch. "Many colonial lawyers . . . trained in London and thus were directly exposed to English practices and ideas." R. Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 Brook. L. Rev. 493, 522 (2007). The exception for regular entries was, as noted above, "closely related in principle" to the shopkeeper exception; in fact, both branches shared a "common origin." 5 J. Wigmore, *Evidence* § 1517. The landmark English case establishing the regular entries branch of the common law rule was decided in the early 1700s. *Id.* § 1518 (citing *Price v. Lord Torrington*, 2 Ld. Raym. 873 (1703)). There, the court admitted regular entries made by a party's clerk. *See id.* At or around this same time, other courts extended the rule to records regularly kept by third parties in the ordinary course of business. *See id.* at n.8 (citing *Smart v. Williams*, Comb. 247

(1694); *Woodnoth v. Lord Cobham*, Bunb. 180 (1724); *Sutton v. Gregory*, Peake Add. Cas. 150 (1797)); *see also* 2 J. Strong, *McCormick on Evidence* § 285 (5th ed. 1999) ("[d]uring the 1700s, a broader [business record] doctrine began to develop in the English common law courts"). "Because colonial lawyers were directly exposed to English practices and ideas," the Framers likely were aware of these developments in the English common law, "whether or not [those developments] appeared in a published treatise or case report shipped to the colonies." *See* R. Kry, 72 Brook L. Rev. at 522.[17]

In all events, it is inconceivable that this Court, in *Crawford*, intended its references to the nontestimonial nature of business records to include only the narrow shopkeeper branch of the common law exception. *See Crawford*, 541 U.S. at 54, 56. That branch has all but disappeared from use and been subsumed into the general rule applicable to regular business entries. *See* 5 J. Wigmore, *Evidence* § 1517. Thus, for the Court's reference to the nontestimonial nature of business records to have any practical meaning, it must by necessity encompass the general common law rule for regular entries as well as shopbooks.

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[17]None of the courts that has endorsed Petitioner's narrow view of the common law as being limited to a party's shopbooks considered the likelihood that the Framers were exposed to these developments. *See, e.g.*, *Thomas v. United States*, 914 A.2d 1, 13 (D.C. 2006), *cert. denied*, 128 S. Ct. 241 (2007); *Radtke v. Taylor*, 210 P. 863, 866-67 (Or. 1922).

Before *Crawford*, the majority of courts concluded that laboratory reports were properly admitted as business records because of the routine nature of the tests performed. *See* P. Giannelli, 49 Ohio St. L. J. at 673.[18] And, notwithstanding Petitioner's contrary suggestion, that trend has largely continued after *Crawford*. Many (but not all) courts have concluded that laboratory reports, like the drug analysis certificates here, are properly admitted as business records because they are prepared in the ordinary course of the laboratory's business.[19] As such, they are "not testimonial in

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[18]*See, e.g., United States v. Frattini*, 501 F.2d 1234, 1236 (2d Cir. 1974) (cocaine); *United States v. Ware*, 247 F.2d 698, 699-700 (7th Cir. 1957) (heroin); *United States v. Roulette*, 75 F.3d 418, 422 (8th Cir.) (cocaine), *cert. denied*, 519 U.S. 853 (1996); *United States v. Baker*, 855 F.2d 1353, 1359 (8th Cir. 1988) (drug analysis); *United States v. Parker*, 491 F.2d 517, 520-21 (8th Cir. 1973) (heroin); *United States v. Garnett*, 122 F.3d 1016, 1018-19 (11th Cir. 1997) (drug analysis); *United States v. Evans*, 45 C.M.R. 353, 356 (C.M.A. 1972) (LSD); *State v. Cosgrove*, 436 A.2d 33, 39-44 (Conn. 1980) (marijuana); *People v. Tsombanidis*, 601 N.E.2d 1124, 1133 (Ill. Ct. App. 1992) (cocaine); *State v. Taylor*, 486 S.W.2d 239, 242 (Mo. 1972) (debris from burglary), *abrogated by State v. March*, 216 S.W.3d 663 (Mo.), *cert. dismissed*, 128 S. Ct. 1441 (2007); *Christian*, 895 P.2d at 680 (blood alcohol); *People v. Porter*, 362 N.Y.S.2d 249, 255 (N.Y. App. Div. 1974) (blood alcohol); *Kreck*, 542 P.2d at 784-85 (blood); *State v. Sosa*, 800 P.2d 839, 843 (Wash. Ct. App. 1990) (heroin). *But see, e.g., Miller v. State*, 472 S.E.2d 74 (Ga. 1996).

[19]*See, e.g., De La Cruz*, 514 F.3d at 133-34 (autopsy); *Feliz*, 467 F.3d at 236 (autopsy); *Ellis*, 460 F.3d at 926-27 (medical report establishing presence of drugs); *Pruitt*, 954 So.2d at 616 (cocaine and marijuana); *Crager*, 879 N.E.2d at 757 (DNA); *Commonwealth v. Carter*, 932 A.2d 1261, 1267-68

nature." *Verde*, 827 N.E.2d at 706 (citing *Crawford*, 541 U.S. at 56); *see also Feliz*, 467 F.3d at 236.

Petitioner contends that these rulings are incorrect because the business record exception generally excludes records prepared in anticipation of litigation. *See* Petr.'s Br. at 20-21 (citing *Palmer v. Hoffman*, 318 U.S. 109, 113-15 (1943)). In *Palmer*, the Court held that a report prepared in connection with a railroad's investigation into the causes of an accident was inadmissible because it was not made "for the systematic conduct of the enterprise" but, instead, was prepared "for use essentially in the court." *Id.* Petitioner contends that the same rule should apply here because the drug analysis certificates were prepared after petitioner's arrest for possible use in his criminal trial.

*Palmer*, however, did not create a "blanket rule" excluding all documents prepared with an eye toward trial. 2 *McCormick on Evidence* § 288. Rather, "what the case has come to stand for is that a record otherwise meeting the requirements of the exception . . . ought not be admitted if there was a substantial motive to misrepresent when the report was prepared." *Bohsancurt*, 129 P.3d at 477 n.4; *see also* 2 *McCormick on Evidence* § 288 ("The existence of a motive and opportunity to falsify the record . . .

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(Pa. 2007) (cocaine); *Forte*, 629 S.E.2d at 144 (DNA); *Cao*, 626 S.E.2d at 305 (mechanical testing of controlled substance); *Malott*, 2008 WL 1932428, at *2 (cocaine). *But see, e.g., State v. Johnson*, 982 So.2d 672, 678 (Fla.), *petition for cert. filed*, 77 U.S.L.W. 3075 (U.S. July 29, 2008) (No. 08-132).

is of principal concern."). Federal Rule of Evidence 803(6) incorporates this interpretation of *Palmer* by permitting the admission of records that otherwise comply with the requirements of the rule, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Accordingly, "[w]here the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed," the record is admissible, even if it concerns a matter destined for litigation. See 5 J. Wigmore, *Evidence* § 1422; 2 *McCormick on Evidence* § 288.

Drug analysis certificates are prepared under these circumstances. The "business" of the analysts is to perform routine tests on substances and record the results of that testing on standard certification forms. Analysts perform these tasks, not in anticipation of litigation, but because their job requires them to do it. *See Cosgrove*, 436 A.2d at 41. Indeed, if a chemical test proves negative, there will not even be a trial.

Merely that testing is performed at the request of the local police does not render the certificates inadmissible as business records. *See Carter*, 932 A.2d at 1267 n.6. Analysts retain complete "independence to objectively test and analyze the samples" they receive, without outside interference. *See Crager*, 879 N.E.2d at 753-54; *Rawlins*, 884 N.E.2d at 1035. Moreover, the "potential for bias is very small" because analysts are employed to function as "neutral and objective" scientists.

*Carter*, 932 A.2d at 1268. *Palmer*, therefore, does not preclude the admission of drug analysis certificates as business records, which by their nature are nontestimonial and, thus, not subject to confrontation. *Crawford*, 541 U.S. at 54, 56.

Furthermore, Petitioner's assertion that drug analysis certificates would be inadmissible under the general Massachusetts business records statute because they were prepared after the start of a criminal case is misplaced. *See* Petr.'s Br. at 26-27 (citing Mass. Gen. Laws ch. 233, § 78). The certificates are admissible under an entirely separate statutory provision, Mass. Gen. Laws ch. 111, § 13, that imposes no similar restriction. In all events, Mass. Gen. Laws ch. 233, § 78 was not enacted until 1913, *see* St. 1913, ch. 288, and, thus, cannot define the scope of the confrontation right that existed at the time of the founding. *See Crawford*, 541 U.S. at 54.

**3. The common law treatment of coroner's reports also supports the admission of drug analysis certificates without live testimony.**

Further support for the admission, without live testimony, of drug analysis certificates can be found in the treatment of coroner's reports at common law. As the Court has noted, depositions taken at coroners' inquests appear to have been a common law exception to confrontation. *Crawford*, 541 U.S. at 47 n.2; *Giles*, 128 S. Ct. at 2706 (Breyer, J., dissenting). One theory advanced for this exception

is that coroner's inquests were "in the nature of a proceeding *in rem*." W. McNeill, *The Testimony Taken Before a Corner Considered as Evidence*, 42 Am. L. Register & Rev. 264, 265 (1894). The coroner was required to hold the inquest "*super visum corporis," i.e.,* upon view of the corpse. *Id.* at 267; S. Rapalje & R. Lawrence, *Dictionary of American and English Law* 1239 (1888). Unlike criminal proceedings, the object of a coroner's inquest was to determine the cause of death by, among other things, examining the body's physical condition. *See* S. Phillips, *Treatise on the Law of Evidence* 280 (1816) (a coroner's "proceeding is not so much an accusation on an indictment, as an inquisition of office to inquire truly, how the party came to his death"); W. McNeill, 42 Am. L. Register & Rev. at 280 (same).

The same, of course, is true of modern-day drug analysis certificates. The object of the laboratory analysis is not to accuse anyone of wrongdoing but, instead, to confirm the physical nature of the substance. Thus, like the common law treatment of coroner's inquests (where the focus was to determine the physical condition of the corpse), no confrontation right attaches to the admission of drug analysis certificates (where the focus is to determine the physical condition of the substance).

Although the "special status" for coroner's *depositions* "failed to survive the Atlantic voyage," *Giles*, 128 S. Ct. at 2706 (Breyer, J., dissenting), the same cannot be said about the coroner's findings concerning the physical condition of the body. *See* W. McNeill, 42 Am. L. Register & Rev. at 267 (a

coroner's inquest was "conclusive against the world"); J. Mnookin, 15 J.L. & Pol'y at 853 n.98 ("Perhaps coroner's physical findings (rather than reports of what others said at an inquest) were permitted even when the coroner did not testify.") As one early American case explained:

> That part of the inquest which ascertains the death of a person and its precise causes, establishes mere physical facts, which are to be ascertained, according to law, for public purposes. . . . The facts, in themselves, are evidence of neither guilt nor innocence, and have no direct tendency to implicate the accused, nor anyone else. There can be no evil resulting from the admission of the record of those facts in evidence, as it can be controverted by the accused, if material to his defence . . . .

*State v. Parker*, 7 La. Ann. 83, 83 (La. 1852).[20]

This treatment, of course, is consistent with the common law's treatment of other types of official

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[20]Where, in contrast, findings contained in a coroner's report link the death to the "person accused of the deed" and "tends to show guilt in him," confrontation is properly required. *Id.* In *Parker*, for instance, the coroner's report "contained the opinion that the accused fired the pistol which caused the death of the decedent." *Id.* This part of the report should not have been admitted without confrontation because it was directly accusatory. *See id.*

records prepared pursuant to a legal duty. *See* Part B(1) *supra*; *see also* J. Jervis, *Archbold's Summary of the Law Relating to Pleading and Evidence in Criminal Cases* 159 (1846) (noting that "the coroner is an elective officer, appointed on behalf of the public to make inquiry of matters within his jurisdiction, who therefore is presumed to [act] fairly and impartially"). Drug analysis certificates should be treated similarly.

### C. Admission of drug analysis certificates did not offend the Confrontation Clause because Petitioner had the opportunity to challenge the analysis and confront the analysts who prepared the certificates.

Even if drug analysis certificates were treated as "testimonial," the trial court's admission of those certificates without live testimony did not violate Petitioner's rights under the Confrontation Clause. Petitioner had ample opportunity under Massachusetts law to challenge the validity of the certificates and confront the individual analysts who prepared them, but he strategically elected not to do so. It is enough under the Sixth Amendment to provide such opportunity, without requiring the adoption of a specific type of "notice and demand" statute or requiring live testimony in every case involving drug analysis.

1. **Petitioner had ample opportunity to challenge the validity of the test results and confront the analysts but chose not to do so.**

Petitioner, like defendants in the "vast majority" of drug cases prosecuted nationwide, recognized that there was little or no utility in challenging the validity of the test results. *See State v. Miller,* 790 A.2d 144, 153 (N.J. 2002). Indeed, as the amicus briefs submitted in support of Petitioner acknowledge, "[f]ew criminal cases actually involve contested expert testimony." Brief of Amici Curiae Law Professors ("Amici Law. Profs.' Br.") at 3, 5; Amici NACDL Br. at 3 (same). The "simple explanation" behind this common defense strategy is that a "defendant impairs rather than enhances his case by insisting upon an extended and substantially uncontroverted presentation of scientific evidence. . . ." Amici Law Profs.' Br. at 8-9 (*citing Old Chief v. United States*, 519 U.S. 172, 189 (1997)).

Had Petitioner adopted a different defense strategy and opted to challenge the validity of the test results, he would have had multiple opportunities to do so under Massachusetts law. Petitioner certainly cannot claim that he was surprised by admission of the certificates as *prima facie* evidence. The statute governing their preparation and admission has been the law in Massachusetts for nearly a century, *see* St. 1910, ch. 495, §§ 1-2, and the prosecution disclosed the certificates during pretrial discovery. J.A. 5; Mass. R. Crim. P. 14(a)(vii). Petitioner could have

obtained, through pretrial discovery, documentation related to the testing methods reflected in the certificates, as well as information about the qualifications of the analysts who performed the tests. *See* Mass. R. Crim. P. 14(a)(2). Additionally, he could have obtained funds, if necessary, to hire his own expert to independently analyze the cocaine. *See* Mass. R. Crim. P. 41; Mass. Gen. Laws ch. 261, § 27B. And, had his request for funds to hire an expert been denied, he could have sought immediate appellate review. *See* Mass. Gen. Laws ch. 261, § 27D; *Commonwealth v. Zimmerman*, 804 N.E.2d 336, 342 (Mass. 2004).

Furthermore, Petitioner could have challenged the scientific validity of the testing methods and the qualifications of the analysts by filing a pretrial motion *in limine* and requesting an evidentiary hearing. *Commonwealth v. Arroyo*, 810 N.E.2d 1201, 1210 (Mass. 2004). At this "inherently fact-intensive" hearing, the trial judge acts as a "gatekeeper," excluding evidence based on any unreliable scientific methods and "assess[ing] the credibility of [the] various expert witnesses in determining whether proposed scientific [evidence] is reliable." *Canavan's Case*, 733 N.E.2d 1042, 1049 (Mass. 2000). Included within this "gatekeeper role" is the trial judge's affirmative obligation to "determine whether the testing at issue was conducted properly," not just whether the testing method was theoretically reliable. *Commonwealth v. McNickles*, 753 N.E.2d 131, 140 (Mass. 2001). This procedure ensures "not only the reliability of the abstract theory and process underlying an expert's

opinion, but the particular application of that process" to a defendant's case. *Patterson,* 840 N.E.2d at 28-29.

Above all, Petitioner had the opportunity to compel the analysts' presence at trial and subject them to cross-examination. He could have obtained a subpoena pursuant to Mass. R. Crim. P. 17 or used his right to compulsory process, under both the state and federal constitutions, to compel the analysts to testify at trial. *See* art. 12 of the Massachusetts Declaration of Rights. Had Petitioner pursued these options for securing the analysts' presence at trial, he would have been able to cross-examine them in the same manner as if they had been called as part of the prosecution's case. *See Commonwealth v. Mahar*, 722 N.E.2d 461, 467 (Mass. 2000) (adopting the state version of Fed. R. Evid. 806).[21]

The Court has recognized in other contexts that the availability of these options alleviates any confrontation concerns. *See United States v. Inadi*, 475 U.S. 387, 397 & n.9 (1986) (if defendant "independently wanted to secure" declarant's testimony at trial, the Compulsory Process Clause "would have aided" him in doing so); *White,* 502 U.S. at 355 ("the Compulsory Process Clause and evidentiary rules permitting a defendant to treat witnesses as hostile will aid defendants in obtaining

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[21]In fact, by relying on the state equivalent of Fed. R. Evid. 806, Petitioner would not have had "to make the showing necessary to have [the analyst] declared a hostile witness, although presumably that option also was available to him." *Inadi*, 475 U.S. at 397 & n.8.

a declarant's live testimony"); *see also Lee*, 476 U.S at 550, n.3 (Blackmun, J., dissenting) ("there was no significant denial of petitioner's right to confrontation, because petitioner herself could have called [the declarant] and questioned him, if necessary, as an adverse witness"). Although the Court in *Crawford* charted a new course for Confrontation Clause analysis, it has not abandoned these earlier decisions. *See Crawford*, 541 U.S. at 58 n.8 & 59 (recognizing prior decisions in *Inadi* and *White*). Nor has it adopted Petitioner's absolutist approach to confrontation.

In these circumstances, it strains logic to conclude that the Commonwealth deprived Petitioner of an opportunity to confront and cross-examine the analysts. *See United Sates v. Owens*, 484 U.S. 554, 559 (1988) ("an *opportunity* for effective cross-examination" is what the Confrontation Clause guarantees) (emphasis in original). Petitioner had multiple opportunities to probe the validity of the drug testing and, if he so desired, cross-examine the analysts. But, he strategically elected not to do so. Whether viewed as the consequence of a deliberate defense tactic or as the Commonwealth's fulfillment of its obligation to provide Petitioner with an *opportunity* for cross-examination, the circumstances of this case provide no credible basis for overturning Petitioner's lawful conviction. *See Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) ("gossamer possibilities of prejudice" should not be used to "set the guilty free"), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964); *United States v. Rith*, 164 F.3d 1323, 1335

(10th Cir.) ("no violation of the Confrontation Clause when the defendant neglected to exercise rights that would have enabled him to confront the witnesses against him"), *cert. denied*, 528 U.S. 827 (1999).

**2. The necessities of trial and the adversary process do not support Petitioner's absolutist approach to confrontation.**

The procedures available to Petitioner also must be viewed in light of this Court's recognition that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *see also Craig*, 497 U.S. at 850 (like other Sixth Amendment rights, the Confrontation Clause must be "interpreted in the context of the necessities of trial and the adversary process"). No matter how "beneficent in their operation and valuable to the accused," confrontation rights "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. United States*, 156 U.S. 237, 243 (1895).

Petitioner's rigid interpretation of the Confrontation Clause would establish a categorical rule requiring live testimony in every case where drug analysis is performed – even when the defendant, like Petitioner here, has no real intention or desire to cross-examine the analysts. This absolutist approach to the Confrontation Clause would result in a significant waste of public resources, with no apparent gain in the truth-

seeking function. It also would violate the fundamental principle that "the rights of the public [in the prosecution of crime] shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Mattox*, 156 U.S. at 243; *see State v. Crow*, 974 P.2d 100, 111 (Kan. 1999) (public has "significant interest in avoiding the unnecessary expense of insuring the presence of laboratory technicians at trials where the content of their testimony will not be challenged by defendants").

The practical reality is that, in the vast majority of drug cases, cross-examination of the analysts who performed the testing is likely be of small utility, given the passage of time and the routine nature of the testing. Months or even years may pass between the testing and trial. *See People v. Durio*, 794 N.Y.S.2d 863, 869 (N.Y. App. Div. 2005). In that time, analysts likely will have performed hundreds, if not thousands, of identical tests as a routine part of their job.[22] No analyst is

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[22]"The scientific analysis of suspected contraband drugs constitutes more than 50% of the caseload of many American crime laboratories." 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 23.01 & n.5. In Massachusetts alone, the Department of Public Health analyzes approximately 40,000 drug samples each year. *See* Brief of Amici Curiae Attorney General and Department of Public Health, *Commonwealth v. Verde*, No. SJC-09320, 2004 WL 3421947, at *5 (2004). And, the demand for these services continues to rise. *See* Bureau of Justice Statistics, *Drug and Crime Facts*, *available at* http://www.ojp.usdoj.gov/bjs/dcf/ptrpa.htm (noting that drug prosecutions comprise an increasing proportion of the federal criminal caseload – from 21% in 1982 to 35% in 2004).

likely to recall from "actual memory" information related to any particular test. *See O'Maley*, 932 A.2d at 13. Rather, if called to testify, the analyst most likely would simply look at the machine-generated test results and confirm what the certificate already says. *See* Part A(1) *supra*; *Moon*, 512 F.3d at 362 ("[a]ny competent chemist would infer from [machine-generated] data that the tested substance was cocaine"); *Rawlins*, 884 N.E.2d at 1032 n.13 ("were the actual analysts who participated in the testing to testify, they would likely do no more than read from their own recordings of steps they took. . . ."). The certificate, in other words, is not a "weaker substitute for live testimony," *see Davis*, 547 U.S. at 828, and cross-examination of the analysts would add little, if anything, to the fact-finding process.

Nevertheless, under Petitioner's rigid interpretation of the Confrontation Clause, analysts would be required to travel throughout the state to appear in thousands of cases where defendants have no intention of cross-examining them. This, in turn, "would greatly reduce the amount of time those scientists have to actually conduct the examinations and analyses and would cause even more delays in the criminal justice system." *Pruitt*, 954 So.2d at 615. And, even in the relatively few cases where a defendant might elect to cross-examine the analyst, the examination likely would be of only "incidental benefit . . . to the accused." *Mattox*, 156 U.S. at 243; *see also* J. Mnookin, 15 J.L. & Pol'y at 837 (it seems "especially nonsensical" to require live testimony "when there is little chance that the . . . author of the forensic report[] will still have any independent

memory of conducting the test by the time of trial").[23]

The approach suggested by the Court in *Inadi* and *White*, which emphasized the accused's right to compel the attendance of witnesses as a basis for rejecting Confrontation Clause challenges, better reflects the realities of the adversarial process. *See Inadi*, 475 U.S. at 397-98; *White*, 502 U.S. at 335. There are, as Justice Harlan noted, a small category of situations "where production [of the declarant] would be unduly inconvenient and of small utility to a defendant." *Dutton*, 400 U.S. at 95-96 (Harlan, J., concurring). In these situations, defendants who genuinely desire cross-examination may use their

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[23]The Amici Law Professors attempt to downplay the potential waste of resources by noting that, according to a recent study, 95% of *all* state convictions in 2004 resulted from a plea. *See* Amici Law Profs.' Br. at 7 (citing Bureau of Justice Statistics, *Felony Sentences in State Courts, 2004* (2007)). That study, however, included only *felony* convictions and did not purport to include the hundreds of thousands of additional misdemeanor trials that take place in state courts every day. *See* Bureau of Justice Statistics, *Felony Sentences in State Courts, 2004* at 1-2, http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf. Moreover, 34% of the total 1,078,920 state-felony convictions obtained in 2004 were drug offenses, meaning that more than 18,000 state-felony drug convictions obtained in 2004 alone resulted from trials, not pleas. *See id.* At or about the same time, a census of the 50 largest crime labs reported a backlog of 270,000 requests for forensic services at the end of 2002. Bureau of Justice Statistics, *50 Largest Crime Labs, 2002* (2004), *available at* http://www.ojp.usdoj.gov/bjs/abstract/50lcl02.htm. Significantly, requests for testing of controlled substances accounted for about half – 136,000 requests – of this total backlog. *Id.*

right to compulsory process to compel the declarant's attendance at trial. *Id.* Rigid insistence on an absolute right to confrontation is neither required nor in the public interest. *See id.; Mattox*, 156 U.S. at 243. Tellingly, Justice Harlan included a laboratory report as one example (along with other types of business and official records) of the type of situation he believed fell within this category of cases. *Dutton*, 400 U.S. at 96 (citing *Kay*, 255 F.2d 476).

This interpretation of the Sixth Amendment achieves the appropriate balance between its two companion clauses: confrontation and compulsory process. *See* P. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 622 (1978). It also is consistent with the purpose underlying the common law official records exception, which was to avoid the prospect of "hosts of officials . . . devoting the greater part of their time to attending as witnesses in court" rather than carrying out their public duties. 5 J. Wigmore, *Evidence* §§ 1631-32. Additionally, it imposes only a slight burden on those defendants who genuinely want to cross-examine the analysts at trial. *See Magruder v. Commonwealth*, 657 S.E.2d 113, 121-22 (Va.) (no impermissible burden in statutory requirement that defendant demand the presence of analysts at trial), *petition for cert. filed*, No. 07-11191 (U.S. June 6, 2008); *cf. Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1621 (2008) (requiring voters to present identification "does not qualify as a substantial burden on the right to vote"). And,

perhaps most importantly from the public's perspective, it prevents a "defendant from challenging his conviction . . . by protesting the absence of a witness he never genuinely desired to examine." P. Westen, 91 Harv. L. Rev. at 323 n.155.

Even Petitioner's *amici* do not advocate for an absolutist approach to confrontation rights. They suggest, for instance, that a defendant's right to confront analysts in drug cases could be satisfied though increased use of pretrial depositions, closed-circuit televisions, and satellite uplinks. *See* Amici Law Profs.' Br. at 17-18; Brief of Amicus Curiae Richard Friedman at 19-20. But, as the record in this case aptly demonstrates, there appears to be no greater prospect that defendants would utilize these alternative procedures for challenging drug analysis certificates any more than the procedures already available under Massachusetts law.

Similarly, Petitioner's *amici* suggest that Massachusetts could adopt a "notice and demand" statute similar to those enacted in other states. *See* Amici Law Profs.' Br. at 13-15. But, the key features of those statutes – notice and demand – already are available under Massachusetts law. Gen. Laws ch. 111, § 13 provides explicit notice that a drug analysis certificate may be admitted at trial as *prima facie* evidence. Massachusetts rules and practice detail all the pretrial mechanisms available to any defendant who desires to test the validity of the testing methods or the qualifications of the analysts. Further, a defendant may demand the presence of an analyst at trial by obtaining a trial subpoena or

invoking his state and federal constitutional rights to compulsory process. When those rights are exercised, Massachusetts evidence law also ensures that a defendant retains the right to cross-examine the analyst in the same manner as if he had been called by the prosecution.

A notice and demand statute – while certainly a legitimate option for state legislatures – is not constitutionally mandated and, in reality, would add very little substance to a defendant's existing rights under Massachusetts law. Indeed, such a statute could very well reduce the flexibility that Massachusetts law currently affords defendants in shaping their trial strategy. A common feature in most notice and demand statutes is the inclusion of strict time limits within which defendants must use or lose their right to demand the analyst's presence at trial. *See, e.g.,* Ark. Code Ann. § 12-12-313(d)(2) (2008) (10-day demand window); Conn. Gen. Stat. § 21a-283(b) (2006) (5-day demand window). No similar constraint exists under Massachusetts law.

In sum, given the nature of drug analysis, the Sixth Amendment's protections are satisfied where, as here, a state offers a defendant the opportunity to probe and challenge the analysis, including the chance to call and cross-examine the analysts. Nothing more is required.

D. **If admission of the drug analysis certificates violated Petitioner's confrontation right, the state courts should determine in the first instance whether the error was harmless beyond a reasonable doubt.**

Assuming that admission of the drug analysis certificates without live testimony be held to have violated Petitioner's confrontation rights, the state courts should be permitted to determine in the first instance whether any such error was harmless beyond a reasonable doubt. *See Coy*, 487 U.S. at 1022; *Lee*, 476 U.S. at 547. A remand is particularly appropriate here, given that: the composition and weight of the drugs were not contested issues at trial; the statements contained in the drug analysis certificates were cumulative of other evidence presented at trial that was sufficient to allow the jury to find Petitioner guilty beyond a reasonable doubt; the certificates did not factor heavily in the trial; and the overall case against Petitioner was very strong. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

Under Massachusetts law, "[p]roof that a substance is a particular drug need not be made by chemical analysis and may be made by circumstantial evidence." *Commonwealth v. Dawson*, 504 N.E.2d 1056, 1057 (Mass. 1987). Experienced police officers, for instance, may testify "as to what drug a particular substance was." *Id.* Here, the Commonwealth presented testimony from two highly-experienced narcotics officers and other witnesses attesting to the composition and weight of

the drugs. *See* Statement, Part 2 *supra*. Petitioner never challenged the expertise of these officers or objected to their testimony that the 4 bags seized from Wright and the 19 bags recovered from the backseat area of the cruiser each contained "at least" ½ gram of cocaine. *See id.*; J.A. 26. In addition, the purchaser of the 4 bags, Wright, admitted to police that the bags contained cocaine. App. 3a; J.A. 35. Wright had no conceivable interest in fabricating such a statement, which directly inculpated him.

The drug analysis certificates were cumulative of this substantial other evidence and did not factor heavily in the case. Petitioner's counsel, in fact, argued that the only issue was who possessed the cocaine, not the weight or composition of the drugs. J.A. 11, 47. Moreover, the prosecutor referred to the certificates only indirectly and in passing in his closing argument. *See* J.A. 48-58. The impact, if any, on the jury of these fleeting references was easily outweighed by the trial judge's explicit instructions – repeated in connection with both the trafficking and distribution charges – that the jury was free to disregard the certificates entirely. J.A. 59-61. The usual "assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue." *Tennessee v. Street*, 471 U.S. 409, 415 n.6 (1985).

There also can be, as the state Appeals Court found based on its review of the entire record, "no real question concerning the sufficiency of the Commonwealth's evidence" establishing Petitioner's

guilt as a joint venturer. App. at 6a. The testimony of the police officers and store manager, together with the surveillance photographs taken at the time of the crime, the identical packaging and appearance of the two batches of cocaine, Petitioner's and Montero's "furtive movements" on the ride to the police station, the cash found on the ground next to the cruiser, and Petitioner's possession of a pager, all established beyond a reasonable doubt Petitioner's role as "a willing participant in the distribution of cocaine to Wright." *Id.* at *3a, 6a-7a.*

## CONCLUSION

Petitioner's conviction should be affirmed. Alternatively, the Court should remand this case to the state court so it may decide whether the error, if any, was harmless beyond a reasonable doubt.

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# REPLY BRIEF

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IN THE
# Supreme Court of the United States

Luis E. Melendez-Diaz,
*Petitioner,*

v.

Massachusetts
*Respondent.*

On Writ of Certiorari
to the Appeals Court of Massachusetts

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

The forensic laboratory reports in this case are sworn declarations from state officials, asserting that evidence the police seized as part of a criminal investigation satisfies an element of the "class B" drug offenses codified in the Massachusetts Controlled Substance Act. The reports' sole purpose was to "simplify proof" in this prosecution by substituting for the officials' being "called as witnesses" and giving their incriminating testimony in court and in front of the jury. Resp. Br. 2 (quoting *Commonwealth v. Johnson,* 589 N.E.2d 328, 330 (Mass. App. Ct. 1992)). The reports, therefore, implicate the Confrontation Clause's core concerns regarding trial-by-affidavit.

The Commonwealth and its amici nonetheless offer a scattershot of arguments to avoid the straightforward conclusion that introducing the reports in place of live testimony violates the Constitution. They argue that forensic reports are not testimonial because they are not directly accusatory; because they are neutral and objective documents; and because they resemble business or official records. The Commonwealth also contends that the Confrontation Clause permits the prosecution to introduce testimonial hearsay so long as the defendant has the ability to challenge the declarations' reliability through pretrial hearings and by calling the declarants as his own witnesses at trial.

None of these arguments withstands scrutiny. The Confrontation Clause applies to declarations created for prosecutorial use regardless of whether they directly accuse someone of committing a crime

and regardless of whether they appear reliable. And the Confrontation Clause categorically requires the prosecution, at the defendant's insistence, to introduce the testimony of available witnesses as part of its case-in-chief before the jury. These simple, fundamental principles have guided criminal trials for centuries, and, as the experience of states other than Massachusetts shows, there is no practical need – much less theoretical justification – for abandoning these principles here.

## I. FORENSIC LABORATORY REPORTS PREPARED FOR USE IN CRIMINAL PROSECUTIONS ARE TESTIMONIAL EVIDENCE.

### A. A Declaration Need Not Directly Accuse The Defendant Of Committing A Crime To Be Testimonial.

The Commonwealth acknowledges, as it must, that a forensic report identifying a substance as an illegal drug incriminates a defendant when combined with other testimony "linking the substance . . . to the person now on trial." Resp. Br. 17; *see also* U.S. Br. 5-6 ("Experience confirms that testing results may . . . inculpate a defendant."). The Commonwealth nonetheless argues that laboratory reports are nontestimonial because they "do not *directly* accuse anyone of any criminal conduct." Resp. Br. 16-17 (emphasis added); *see also id.* 20 (statement is testimonial only if it asserts "that the person now on trial . . . committed a crime"). This novel conception of the Confrontation Clause is so extraordinarily narrow as to blink common sense. Not surprisingly, it also contravenes the text of the Sixth Amendment and this Court's precedent.

1. The Commonwealth's "directly accusatory" rule is startlingly restrictive. Many criminal prosecutions rest entirely on circumstantial evidence, none of which "directly accuse[s] anyone of any criminal conduct." Resp. Br. 16-17. Consider, for instance, a typical homicide case. One person says he heard gunshots just after midnight. Another says he saw a man speed away from the scene in a blue car. Another says that a local man named Joe Smith, who happens to own a blue Chevrolet, also owns a legally registered hunting rifle. And so on. Under the Commonwealth's view of the Confrontation Clause, the prosecution could present such cases entirely through out-of-court affidavits. The same would be true respecting prosecutions for white collar crimes such as money laundering, where each person's testimony provides merely a link in a complex chain of prosecutorial evidence. Even in cases that feature a witness who directly accuses the defendant of committing the crime, the prosecution could present the great bulk of its evidence, under the Commonwealth's theory, through affidavits or the civil-law mode of *ex parte* examinations.

It is hard to understand how this could be constitutional. "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford v. Washington*, 541 U.S. 36, 50 (2004). In the place of such out-of-court testimony, the Framers insisted upon following the common-law system of "open examination of witnesses *viva voce*, in the presence of all mankind" at a public trial. 3 William Blackstone, Commentaries on the Laws of

England *373 (1768). It would make a mockery of the Confrontation Clause to restrict its application only to the occasional case in which some witness makes a direct and complete accusation that the defendant committed the crime.

2. The text of the Confrontation Clause confirms that it does not limit the confrontation right to evidence that directly accuses the defendant of criminal conduct. The Clause guarantees a defendant the right to be confronted with "the witnesses against him." U.S. Const. amend. VI. The phrase "witnesses against" is broader than the word "accusers."

There is ample evidence that the Framers deliberately selected the broader concept. Some state declarations of rights that preceded the federal Bill of Rights distinguished between "accusers" and "witnesses," yet each protected the right to be confronted with *both*.[1] All other state confrontation provisions simply protected the right to be confronted with the prosecution's witnesses.[2] Thus, while statements

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[1] *See* Virginia Declaration of Rights § VIII (1776) ("That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses . . . ."); Delaware Declaration of Rights § 14 (1776) ("That in all prosecutions for criminal offences, every man hath a right . . . to be confronted with the accusers or witnesses . . . ."); North Carolina Declaration of Rights § VII (1776) ("[I]n all criminal prosecutions, every man has a right . . . to confront the accusers and witnesses with other testimony . . . .").

[2] *See* Pennsylvania Declaration of Rights § IX (1776) ("That in all prosecutions for criminal offences, a man hath a right . . . to be confronted with the witnesses . . . ."); Maryland Declaration of Rights Art. XIX (1776) ("That in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him"); Vermont Declaration of Rights Art. X (1777) ("[I]n all

directly accusing the defendant of committing a crime may lie at the *core* of the right to confrontation, nothing suggests that the right was intended to be limited to such direct accusations, leaving prosecutors free to present the rest of their cases by means of affidavits or *ex parte* deposition testimony. *See California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, *and absentee witnesses*.") (emphasis added).

3. This Court's precedent reinforces that "a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause" so long as "his testimony is part of the body of evidence that the jury may consider in assessing his guilt." *Cruz v. New York*, 481 U.S. 186, 190 (1987).

In *Kirby v. United States*, 174 U.S. 47 (1899), the government charged the defendant with receiving stolen goods. At trial, the prosecution introduced records of statements (apparently, guilty pleas) from certain individuals confessing to having stolen the property at issue. *Id.* at 49. These records, just like the forensic reports here, indicated that the objects at the center of Kirby's prosecution were illicit, but they did not directly accuse Kirby of anything. This Court nevertheless held that the Confrontation Clause applied to the records and precluded the government

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prosecutions for criminal offenses, a man hath a right . . . to be confronted with the witnesses . . . ."); Massachusetts Declaration of Rights Art. XII (1780) ("[E]very subject shall have a right . . . to meet the witnesses against him fact to face . . . ."); New Hampshire Bill of Rights Art. XV (1784) ("[E]very subject shall have a right . . . to meet the witnesses against him face to face . . . .").

from introducing them in place of "witnesses confronting the accused" respecting the facts they alleged. *Id.* at 56.

Drawing from Justice Harlan's concurrence in *Dutton v. Evans,* 400 U.S. 74 (1970), the Commonwealth urges this Court to recast *Kirby* as resting on grounds other than the Confrontation Clause. Resp. Br. 33. In *Crawford v. Washington,* 541 U.S. 36 (2004), however, this Court already "reject[ed]" Justice Harlan's restrictive view of the Confrontation Clause expounded in *Dutton* and cited *Kirby* with approval as a confrontation case. *See Crawford,* 541 U.S. at 50-51, 57. *Kirby,* in short, means what it says. The decision also is consistent with this Court's explanation years later in *Dowdell v. United States,* 221 U.S. 325 (1911), that a declarant is a "witness against the accused within the meaning" of the Confrontation Clause whenever he testifies to "facts concerning [the defendant's] guilt or innocence." *Id.* at 330.

The Commonwealth further suggests that this Court's *Bruton* jurisprudence excludes from the reach of the Confrontation Clause statements that "become [incriminating] . . . 'only when linked with other evidence introduced later at trial.'" Resp. Br. 24 (quoting *Gray v. Maryland,* 523 U.S. 185, 191 (1998), quoting in turn *Richardson v. Marsh,* 481 U.S. 200, 208 (1987)); *see also Bruton v. United States,* 391 U.S. 123 (1968). But the *Bruton* doctrine does just the opposite: it confirms beyond a doubt that the Confrontation Clause applies to such statements. A *Bruton* situation arises when two defendants are tried together and one has confessed. If the confessing defendant refuses to take the stand, his confession "cannot be admitted against the other." *Richardson,*

481 U.S. at 206; *see also Cruz*, 481 U.S. at 189-90. So the question arises whether the prosecution can still introduce the confession *against the defendant who confessed*. The *Bruton* doctrine allows the prosecution to introduce the confession against the confessing defendant when it is redacted so that it incriminates the co-defendant "only when linked with [other] evidence." *Richardson*, 481 U.S. at 208. But this rule respecting confessions that are not directly accusatory does not relax the basic bar against introducing such statements *against nonconfessing defendants*. To the contrary, this Court insists that even after the statement is redacted, the trial court must give a "limiting instruction" specifically admonishing the jury that it may not consider the statement as evidence against a nonconfessing defendant. *Cruz*, 481 U.S. at 190; *Richardson*, 481 U.S. at 211.

### B. Evidence Need Not Appear To Be Biased Or Inaccurate To Be Testimonial.

The Commonwealth next claims that forensic reports are nontestimonial for three inter-related reasons. First, the Commonwealth asserts that forensic examiners are "neutral" governmental agents because they have "no interest or stake in the outcome" and "sometimes determine that the substances submitted for testing are not drugs at all." Resp. Br. 40, 50. Second, the Commonwealth contends that laboratory reports are "objectively verifiable" and "reflect only . . . objective or neutral facts." Resp. Br. 23, 29. Third, the Commonwealth argues that when a forensic report "is confirmed by mechanical testing . . . , the primary source of the [report's conclusion] is not even the analyst, but the machine itself." Resp. Br. 30.

These three arguments are just different ways of asserting that forensic reports should be deemed nontestimonial because they are reliable. This Court in *Crawford*, however, expressly rejected such an approach to the Confrontation Clause. And even if the perceived reliability of forensic reports mattered in some way, the Commonwealth's suggestions that such report are indisputable are significantly overblown.

1. It is irrelevant to the "testimonial" inquiry whether declarants are supposedly neutral or whether their statements concern objectively verifiable facts. The Confrontation Clause, as this Court explained in *Crawford*, "is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." 541 U.S. at 61. Accordingly, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. That is not what the Sixth Amendment prescribes." *Id.* at 62.

Contrary to the Commonwealth's and United States' suggestions, this principle applies with full force to declarations prepared for criminal prosecutions that purportedly do nothing more than "report" objective observations concerning nontestimonial evidence. Resp. Br. 30; U.S. Br. 20-21. Such declarations – prepared as they are by humans – transmit at least implicit assertions regarding the declarants' perception, attentiveness, methodology, and honesty. Those implicit assertions render such reports testimonial and thus subject to the Constitution's procedural rules governing testimonial evidence.

An everyday example illustrates the point. Police officers, just like state-employed forensic examiners, are public agents charged with pursuing justice, and they are legally required to divulge exculpatory as well as inculpatory evidence. *See Giglio v. United States,* 405 U.S. 150 (1972); *Brady v. Maryland,* 373 U.S. 83, 87-88 (1963). As part of their investigations, police officers often investigate crime scenes and record objectively verifiable observations regarding nontestimonial (physical) evidence – *e.g.*, the house at issue is located behind two oak trees; there is a foot-long blood stain on the carpet; there are clothes strewn across the master bedroom; etc. Yet it would be outlandish to suggest that the prosecution could introduce a police officer's affidavit describing a crime scene in place of live testimony simply because police investigations sometimes exonerate suspects and because the officer's observations report objective facts concerning nontestimonial evidence. *Cf. Crawford,* 541 U.S. at 66 ("The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers.").

The same principle controls here. The Commonwealth did not introduce a machine, "print-out or screen-shot of [any laboratory] instrument's direct output" into evidence at petitioner's trial. U.S. Br. 22. Instead, it submitted forensic analysts' sworn assertions that the bags that the Boston Police Department gave them contained certain amounts of cocaine. Pet. App. 24a-29a. Those human assertions were testimonial.

2. Even if this Court were inclined to try to distinguish between reports that neutrally and

objectively describe nontestimonial evidence and those that are not necessarily reliable, forensic reports would unquestionably fall in the latter camp. The Commonwealth asserts that forensic examiners are neutral state officials who lack any personal interest or knowledge concerning police investigations. Resp. Br. 23, 29. But most examiners are given extrinsic information suggesting suspects' guilt at the same time police officers ask them to perform forensic tests. Edward J. Ungvarsky, *Remarks on the Use and Misuse of Forensic Science to Lead to False Convictions*, 41 New Eng. L. Rev. 609, 618 (2007).[3] And all examiners know, at the very least, that their findings are "to be used for the enforcement of law," Mass. Gen. Laws ch. 111, § 12. It is well established that examiners in such a situation perceive a stake in the law enforcement enterprise that subtly (and sometimes overtly) biases their work toward the prosecution. *See generally* D. Michael Risinger et al., *The* Daubert/Kumho *Implications of Observer Effects*

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[3] Explaining incidents in which faulty DNA analyses contributed to wrongful convictions, Ungvarsky writes: "How can forensic DNA evidence be wrong? Scientists are supposed to be disinterested and dispassionate. But that is not the way forensic science collection and analysis generally works. Police departments deliver biological material with cover letters to laboratory personnel that inform the analysts of non-DNA evidence that suggest the suspect's guilt and then ask the analyst to corroborate that inculpatory evidence. This subtle influencing can lead to erroneous interpretations of physical evidence. It is often easy to interpret, unconsciously and unintentionally, evidence in a way that is consistent with the theory the prosecution has presented. There is a natural impulse that, when given both a complicated crime-scene profile and a suspect profile, the forensic technician will combine her analysis of the samples and conclude that the suspect's profile can be observed in the crime-scene evidence." Ungvarsky, *supra*, at 618.

*in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 Cal. L. Rev. 1 (2002).

The Commonwealth also claims that forensic reports are "objectively verifiable" and "reflect the results of neutral, scientific testing." Resp. Br. 29. But as the amicus brief from the Innocence Network demonstrates in great detail, forensic science depends on subjective judgment (not to mention personal integrity), and even well-intentioned reports often have startling error rates. Just last week, the prosecuting attorney for Wayne County, Michigan – one of the signatories of the National District Attorneys Association's amicus brief – announced she was closing Detroit's crime laboratory after a report revealed "erroneous or false findings in 10 percent of 200 random cases." Corey Williams, *Error-Prone Detroit Police Crime Lab Shut Down*, Associated Press, Sept. 25, 2008, http://ap.google.com/article/ALeqM5g4iOg8AHDDZBOKqdpOPbvuUik5HwD93E4K2G0. And lest there be any doubt, drug tests are susceptible to the same kinds of mistakes as other forensic analyses, as leading scholars have reported, "there seems to be a significant error rate in the drug testing conducted by some American laboratories." 2 Paul C. Giannelli & Edward J. Imwinkelried, Scientific Evidence § 23.01 (4th ed. 2007).[4]

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[4] For additional, recent examples, see Radley Balko & Roger Koppl, *C.S.Oy*, Slate, Aug. 12, 2008, http://www.slate.com/id/2197284/; Thomas J. Lueck, *Sloppy Police Lab Work Leads to Retesting of Drug Evidence*, N.Y. Times, Dec. 4, 2007, at B1 ("[S]loppy work by analysts in the [New York Police D]epartment's crime laboratory could have skewed drug evidence used by prosecutors.").

Finally, the United States posits that a forensic examiner testing for the presence of drugs "effectively functions as a reporter, relaying the nontestimonial instrument-generated results" of a laboratory test "to a court." U.S. Br. 20. But as the Commonwealth acknowledges, "some interpretation of the machine-generated data ordinarily is required" to conclude that a sample contains an illegal drug. Resp. Br. 30 n.10; *see also* Petr. Br. 31-32 (describing subjective judgments that are required); Br. of Alabama et al. 20 ("[H]uman technicians likely interpret[] the machine's raw data in some fashion."). This need for interpretation creates the possibility for honest mistakes, negligence, and worse – including the all-too-frequent practice of "dry labbing," that is, attesting to examinations that are never even conducted. *See* Br. of Innocence Network 15-17. Hence, even if there were some constitutional basis for distinguishing prosecutorial reports that do nothing more than attest to the validity or existence of records from those that proffer "[a] person's *interpretation* of" evidence or test results, U.S. Br. 16, the forensic reports here would fall squarely in the latter class.[5]

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[5] Contrary to the United States' suggestion, nothing in *Dowdell v. United States*, 221 U.S. 325 (1911), suggests that reports "prepared in lieu of testimony for use at trial" (U.S. Br. 19) can be nontestimonial. *Dowdell* did not involve a report prepared in lieu of testimony for use at trial. Rather, the case involved certificates that court personnel prepared *after a trial was over*, for purposes of completing the record for appellate review. 221 U.S. at 330-31. Such certificates do not implicate the Confrontation Clause any more than does a typical transcript or notation of a guilty plea prepared by a court reporter. Each of the other cases the United States cites for the generalized proposition that "a certificate [prepared as a substitute for live testimony] reflecting the

### C. Forensic Lab Reports Would Not Have Been Admissible During The Founding Era As Business Or Official Records.

Petitioner has explained that the historical treatment of forensic-type reports reinforces the conclusion that such reports are testimonial. Petr. Br. 19-30. The Commonwealth nonetheless contends that the common law's conception of business and public records actually demonstrates that forensic reports are nontestimonial. It faces a high burden in making this argument. In *Crawford*, this Court held that the Sixth Amendment's requirement of confrontation does not countenance any "open-ended exceptions . . . to be developed by the courts," but rather "admit[s] only those exceptions established at the time of the founding." 541 U.S. at 54; *see also id.* at 56. The Commonwealth cannot make the showing that *Crawford* requires, for there is no reason to believe that forensic reports would have been admissible as business or public records at the time of the Founding.

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contents of [nontestimonial] records" is itself nontestimonial (U.S. Br. 20) comes from a lower court and post-dates *Crawford*. *See* U.S. Br. 19-20. At least some of the cases appear to conflict with historical practice and precedent. *See* Petr. Br. 23 n.3 (citing cases); *see also* 3 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 1678(7), at 560 (2d ed. 1923) ("[T]he only evidence receivable" at common law to prove the nonexistence of a record "would be the testimony on the stand of one who had made a search . . . ."); 1 S. March Phillipps et al., A Treatise on the Law of Evidence 317 n.5 (5th Am. ed. 1868) (same). In any event, each of the cases involves a report that, unlike a forensic analysis, describes something that was not itself generated for prosecutorial purposes.

1. The Commonwealth's suggestion that laboratory reports would have fallen within the Founding-era business-records hearsay exception misconceives the historical development of that exception. No Founding-era case characterized a report prepared for litigation as a business record. Furthermore, in *Palmer v. Hoffman,* 318 U.S. 109 (1943), this Court expressly declined to construe the business-records exception – even as it then existed in its broad, post-Founding form, covering not just shop books but also other "regular entries made in the course of business," Resp. Br. 45 – to include records created during the "[p]reparation of cases for trial." *Palmer*, 318 U.S. at 113-14. "Unlike payrolls, accounts receivable, accounts pay-able, bills of lading and the like," this Court explained, evidentiary reports "are calculated essentially for use in the court, not in the business." *Id.* at 114.

The Commonwealth argues that *Palmer* has "come to stand for" the more generalized notion that a record "ought not be admitted if there was a substantial motive to misrepresent when the report was prepared." Resp. Br. 49 (quotation omitted). Even if true, this assertion is irrelevant. *Palmer* found unequivocally that reports prepared for litigation fall outside of the common law's conception of business records. 318 U.S. at 113-14. That holding confirms that such reports were not admissible as business records at the time of the Founding (or for generations thereafter). To any extent that modern hearsay law now characterizes as business records some supposedly reliable reports generated for litigation, that reality does not dent the Confrontation Clause's conception of such reports as testimonial evidence;

confrontation concerns "do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." *Crawford*, 541 U.S. at 56 n.7; *see also id.* at 61 (Clause does not turn on "the vagaries of the rules of evidence").

2. Nor would forensic reports have been admissible during the Founding era as public or official records. Common law courts recognized a hearsay exception covering records prepared by public officials acting pursuant to a public duty. *See* 3 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 1632, at 386 (2d ed. 1923). But the Commonwealth and its amici fail to cite a single case from the Founding era – or, for that matter, from nearly a century-and-a-half thereafter – in which reports prepared for use as evidence against a criminal defendant were deemed official records or exempt from confrontation.

To be sure, the Commonwealth and its amici cite various cases involving prison entrance and discharge records, weather records, military enlistment records, and marriage certificates. Resp. Br. 37-38; U.S. Br. 11-12; Br. of NDAA et al. 29-31. But those cases support nothing more than the proposition that routine records created by public officials independent of the prosecutorial process are classifiable as official records. Even if it might be "foreseeable" that such records might occasionally be used in litigation or even that they might sometimes be used to "prov[e] a fact essential to the government's case," U.S. Br. 11-12, the fact remains that these types of records are not *created to serve as surrogates for testimony in criminal cases.* And it is *that* quality – the "[i]nvolvement of govern-

ment officers in the production of testimony with an eye toward trial," *Crawford*, 541 U.S. at 56 n.7 – that distinguishes forensic laboratory reports from traditional public records; that likens them to the kinds of police reports that even today fall outside the public records rule; and that makes it clear beyond peradventure that they are testimonial. *See* Petr. Br. 21-22.

The United States suggests that forensic examiners' evidentiary reports are exempt from confrontation requirements even though police reports are not, because forensic examiners "have an official duty to conduct and report their analyses accurately." U.S. Br. 13. But this is nothing more than a reliability-based argument, which *Crawford* flatly precludes. *See supra* p. 8. In any event, police officers also have an official duty to conduct their investigations dispassionately and to report their findings accurately. *See, e.g., Luna v. Massachusetts*, 354 F.3d 108, 109-10 (1st Cir. 2004). Likewise, magistrates taking examinations under the Marian statutes acted under an official duty of law, yet the admission of their reports was a "principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50.

Finally, the Commonwealth and its amici claim that the treatment of coroners' reports during the Founding era indicates that forensic reports would have been admissible as public records. Resp. Br. 51-54; Br. of Alabama et al. 13-15. But under the prevailing practice at that time, coroners' reports were not offered as "a source of evidence" against the accused at all. Wigmore, *supra*, § 1671(6), at 516. As Wigmore's treatise explains, such reports, "so far as *criminal* proceedings [were] concerned, [were] 'in the

nature of indictments.'" *Id.* (quoting Edward Hyde East, I Pleas of the Crown 389 (1803)); *see also Smalls v. State*, 28 S.E. 981, 982 (Ga. 1897) ("At common law the verdict of a coroner's jury was, when it contained the subject-matter of an accusation, equivalent to an indictment of the accused for the homicide of the deceased."); William L. Clark, Criminal Procedure § 50, at 130 (1895) ("[T]he finding of the coroner's jury is itself equivalent to the finding of a grand jury."). "[T]herefore," it was "superfluous . . . to offer [coroners' reports] against the accused on trial; they [were] the foundation of the charge against him." Wigmore, *supra*, § 1671(6), at 516 (footnote omitted).

The Commonwealth's argument that coroners' reports were actually admissible as evidence relies exclusively on a single case: *State v. Parker*, 7 La. Ann. 83, 1852 WL 3553 (La. 1852). *See* Resp. Br. 53. In that case, the Louisiana Supreme Court held that the procès verbal of a coroner's inquest was admissible respecting the fact and physical cause of death. Louisiana, however, appears to have been the only state that allowed prosecutors to introduce coroners' findings into evidence, departing from the common law view that coroners' reports served only as a basis for bringing a criminal charge. "The general rule" well into the twentieth century was that "in a prosecution for homicide the finding of a coroner or the verdict of a coroner's jury as to the manner and cause of the death of the deceased [was] inadmissible in evidence *for any purpose*." *Sandel v. State*, 119 S.E. 776 (S.C. 1922) (quoting 4 Ann. Cas. 1020 (William M. McKinney et al. eds., 1907) (collecting cases)); *see also* B. W., *Official Records. Coroner's Inquest*, 65 U. Penn L. Rev. 290 (1917) ("In homicide cases the verdict of the coroner is

clearly inadmissible in every state in the Union except Louisiana."). The suggestion that *Parker* – an isolated decision from the only state with a civil law heritage – reflects "how modern-day forensic lab reports would have been treated 'at the time of the Founding' and shortly thereafter," Br. of Alabama et al. 14 (citation omitted), is thus, to say the least, misleading.

## II. STATES MAY NOT AVOID THE CONFRONTATION CLAUSE BY GIVING DEFENDANTS ALTERNATIVE WAYS TO CHALLENGE FORENSIC EVIDENCE OR BECAUSE PRESENTING LIVE FORENSIC TESTIMONY MIGHT BE BURDENSOME.

This Court held in *Crawford* that "[w]here testimonial evidence [from available witnesses] is at issue, . . . the Sixth Amendment demands what the common law required": in-court testimony subject to cross-examination. 541 U.S. at 68. The Commonwealth and its amici nonetheless argue, for two reasons, that even if forensic reports are testimonial, the prosecution need not present such evidence through ordinary confrontation procedures. First, the Commonwealth asserts that a state satisfies the Confrontation Clause by giving defendants options besides traditional confrontation "to challenge the validity of [forensic reports] and confront the individual analysts who prepare[] them." Resp. Br. 54. Second, the Commonwealth and its amici argue that requiring forensic examiners to present their analyses through live testimony "would overwhelm the existing judicial, prosecutorial and administrative resources" devoted to handling narcotics cases. Br. of NDAA et

al. 8, 10; *see also* Resp. Br. 61; Br. of Alabama et al. 28. Neither of these arguments withstands scrutiny.

### A. Allowing Defendants To Challenge Testimonial Evidence In Pretrial Hearings Or Through The Use Of Their Subpoena Power Does Not Satisfy The Confrontation Clause.

The Commonwealth argues that even if forensic reports are testimonial, it satisfied the Confrontation Clause in this case because petitioner could have attacked the validity of the forensic reports here in one of two ways: (1) by availing himself of pretrial procedures to challenge the reliability of the laboratory reports, *see* Resp. Br. 55-57, or (2) by issuing a subpoena to compel the forensic analysts to submit to cross-examination "as if they had been called as part of the prosecution's case," *id.* at 57. To the extent that these arguments are fairly included in the question presented, they plainly lack merit.

1. A state does not satisfy the Confrontation Clause by affording a defendant an opportunity to challenge in a pretrial hearing "the scientific validity of the testing methods and the qualifications of [forensic] analysts." Resp. Br. 56. Such an *in limine* procedure merely allows a defendant to invoke a state court's "gatekeeper role" of excluding expert testimony that is so unreliable that it should not even be presented to the jury. *Id.*; *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Confrontation Clause, however, conveys procedural rights that a defendant may invoke *at trial*, regardless of whether the evidence at issue is "deemed reliable by

a judge." *Crawford*, 541 U.S. at 61. The Clause, in other words, "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination" before a jury that can observe the witnesses as they testify. *Id.*

2. Nor is a defendant's ability to subpoena a forensic examiner (or any other prosecution witness) as part of his defense enough to satisfy the Confrontation Clause. The Clause guarantees a defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. As this passive language implies – and as numerous courts squarely have held – it is the prosecution's responsibility to arrange the confrontation, not the defendant's.[6]

This Court's precedent comports with this understanding of the Sixth Amendment. In *Taylor* v. *Illinois*, 484 U.S. 400 (1988), this Court explained that the right to confrontation, like most other Sixth Amendment rights, "arise[s] automatically on the initiation of the adversary process and no action by the

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[6] *See Belvin v. State*, 986 So. 2d 516 (Fla. 2008) (holding that right to subpoena forensic examiner does not satisfy Confrontation Clause); *Thomas v. United States*, 914 A.2d 1 (D.C. 2006) (same); *State v. Coombs*, 821 A.2d 1030 (N.H. 2003) (same) (subpoena power "is beside the point" because "the duty to confront a defendant with witnesses falls upon the State."); *People v. McClanahan*, 729 N.E.2d 470, 477 (Ill. 2000) (same); *Barnette* v. *State*, 481 So. 2d 788, 792 (Miss. 1985) (same); *United States v. Oates*, 560 F.2d 45, 82 n.39 (2nd Cir. 1977) (same); *State v. Rohrich*, 939 P.2d 697 (Wash. 1997) (same regarding child witness); *Snowden* v. *State*, 867 A.2d 314, 332 (Md. 2005) (same); *Schaal* v. *Gammon*, 233 F.3d 1103, 1107 (8th Cir. 2000) (same); *Lowery v. Collins*, 996 F.2d 770 (5th Cir. 1993) (same); *Briggs v. State*, 789 S.W.2d 918 (Tex. Crim. App. 1990) (same).

defendant is necessary to make [it] active in his or her case." *Id.* at 410. More specifically, the right to confrontation is "designed to restrain the prosecution by regulating the procedures by which it presents *its case* against the accused. [It applies] in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own." *Id.* at 410 n.14 (emphasis added) (quotation marks omitted). This means that absent obtaining a defendant's consent to present testimonial hearsay of an available witness in lieu of live testimony, the prosecution must call the witness to the stand or forego introducing the out-of-court statement.

Any other conception of the Confrontation Clause would render it a superfluous constitutional right. As the Commonwealth acknowledges (Resp. Br. 57), the Sixth Amendment's Compulsory Process Clause – which guarantees defendants the right "to have compulsory process for obtaining witnesses in [their] favor," U.S. Const. amend. VI – already gives defendants the right to "compel a witness' presence in the courtroom" for a live examination. *Taylor*, 484 U.S. at 409. The Commonwealth would thus have this Court construe the Confrontation Clause to afford a defendant nothing more than the Compulsory Process Clause already gives him. This result contravenes the "first principle of constitutional interpretation," which is that "every word must have its due force, and appropriate meaning." *Wright* v. *United States*, 302 U.S. 583, 588 (1938) (quotation marks omitted). "[N]o word" in the Constitution "was unnecessarily used, or needlessly added." *Id.*

This is especially true with respect to the "bedrock procedural guarantee," *Crawford*, 541 U.S. at 42, that the Confrontation Clause secures. Allowing the prosecution to present its case through extra-judicial declarations – subject only to defendants' subpoena power – deprives defendants of the ancient right to stand "face-to-face" with adverse witnesses as the witnesses convey incriminating evidence on direct examination. Moreover, instead of having the right to undertake cross-examination on the heels of the prosecution's direct examination, with little risk of worsening the evidentiary record or alienating the jury, defendants required to subpoena adverse witnesses in order to question them must gamble that calling a witness to the stand will generate such powerful impeachment evidence that the jury will understand why the defense wanted to elicit the testimony. *See Lowery*, 996 F.2d at 772; *Rohrich*, 939 P.2d at 700-01. This "is no substitute for cross-examining that declarant *as a state's witness*." *State v. Fisher*, 563 P.2d 1012, 1017 (Kan. 1977) (emphasis added); *see also* Richard D. Friedman, *Shifting the Burden*, Mar. 16, 2005, http://confrontationright.blogspot.com/2005/03/shifting-burden.html (elaborating on this point).[7]

Lest there be any remaining doubt, the Commonwealth's argument that it may simply leave it to defendants to subpoena prosecutorial witnesses leads to patently unacceptable results. As the Illinois Supreme Court has recognized, this proposition, taken

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[7] Professor Friedman also elaborates on the practical deficiencies of requiring defendants to subpoena forensic examiners in a pending petition for certiorari. *See* Petition for a Writ of Certiorari, Briscoe v. Virginia, No. 07-11191 (Mar. 29, 2008).

to its logical conclusion, would "necessarily mean that there would be no constitutional problem with allowing the State to introduce all of its evidence by affidavit as long as the defendant is allowed to bring the prosecution's witnesses into court himself." *People v. McClanahan*, 729 N.E.2d 470, 477 (Ill. 2000).

It is difficult to conceive of a scenario more offensive to the Confrontation Clause. "The primary object" of the Clause is "to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination . . . of the witness . . . ." *Mattox* v. *United States*, 156 U.S. 237, 242 (1895); *accord Crawford*, 541 U.S. at 50; *California* v. *Green*, 399 U.S. 149, 157 (1970). No conception of the Confrontation Clause that permits – indeed, invites – prosecution-by-*ex-parte*-interview can be correct.

### B. Any Burden That Subjecting Forensic Reports To Traditional Confrontation Requirements Imposes Does Not Warrant Suspending The Confrontation Clause.

The Commonwealth and its amici assert that petitioner advocates an "absolutist approach" to the Confrontation Clause that would impose severe and unjustified burdens on criminal justice systems. Resp. Br. 59; Br. of Alabama et al. 21. But these assertions misapprehend petitioner's position and overestimate the requirements it would impose on states such as Massachusetts. And even if abiding by traditional confrontation requirements would impose burdens on some states, that would not supply a valid reason for avoiding these time-tested procedures.

1. Contrary to the Commonwealth's argument, petitioner does not advocate a "categorical rule requiring live testimony in every case where drug analysis is performed – even when the defendant . . . has no real intention or desire to cross-examine the analysts." Resp. Br. 59. Nor would petitioner unavoidably "require the [prosecution] to keep the testing analyst at their beck and call, in the courtroom, at trial – just in case a defendant raises a last-second *Crawford* objection." Br. of Alabama et al. 22. Rather, petitioner's point is merely that the Confrontation Clause permits a defendant to insist that testimonial evidence, including forensic reports, be introduced by means of live trial testimony that is subject to cross-examination. If prosecutors believe that a defendant has no intention of challenging forensic evidence, they may seek and obtain waivers or stipulations obviating the need to present live testimony.

Some states, including the major population centers of California and Illinois, already follow a system requiring prosecutors, absent obtaining stipulations or waivers, to present forensic testimony at trial through live witnesses. *See* Pamela R. Metzger, *Cheating the Constitution,* 59 Vand. L. Rev. 475, 478 & n.10 (2006). Forensic reports in these states are admissible when accompanied by live testimony of a forensic examiner, but not on their own under any hearsay exception. *See, e.g.,* 3 California Criminal Defense Practice § 71.23 (2005). Nothing suggests that the criminal justice system in any of these states has ground to a halt, or even has slowed in processing cases. This is probably because the overwhelming majority of criminal prosecutions result

in plea bargains. And even in the sliver of cases that proceed to trial, it is "almost always the case," as the Commonwealth itself explained in a brief to the Massachusetts Supreme Judicial Court in *Verde* (and acknowledges again here) that forensic laboratory reports are "almost always . . . admitted without objection." Br. for the Commonwealth as *Amicus Curiae* 7, *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005), *available at* 2004 WL 3421945 (citations omitted).

> Generally, defendants do not object to the admission of drug certificates most likely because there is no benefit to a defendant from such testimony. The testimony of the analyst will only serve to resolve any possibility of reasonable doubt, not only in the identification of the substance as contraband but also as to the weight of the substance for trafficking offenses.

*Id.*; *accord* Resp. Br. 55; U.S. Br. 24. Accordingly, prosecutors frequently are able to secure waivers respecting forensic reports or pretrial stipulations in which defendants voluntarily attest that forensic examiners have reached certain conclusions. *See* Br. of Law Professors at 10-13; Anthony G. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases § 357 (1989) ("Counsel should always keep in mind the possibility of offering to stipulate to matters that the prosecutor can amply prove . . . .").

If a state wishes to be even more proactive than simply allowing its prosecutors to obtain plea bargains or pretrial stipulations in the vast majority of cases, it may – as the United States explains and as several

states already have done – adopt a "notice-and-demand" statute. Such a statute may "require the defense counsel," after receiving notice of the prosecution's intent to present forensic evidence, to "demand before trial that the laboratory witnesses be called to testify." U.S. Br. 32; *see also* Br. of Law Professors 13-15 & 14 n.2 (discussing ten state statutes legitimately mandating such procedures).[8] Accordingly, if the Commonwealth thinks it unfair that petitioner was able insist on his confrontation rights at what its amici call the "last second" – namely, when prosecution attempted to introduce testimonial hearsay as a substitute for live testimony – it has ample tools at its disposal to avoid such occurrences in the future.

2. In the end, whatever extra burden states might face to abide by the dictates of the Confrontation Clause with respect to forensic evidence is irrelevant. Time and again, this Court has emphasized that when it comes to the rudiments of criminal procedure, attempts to "secure greater speed, economy and convenience in the administration of law at the price of

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[8] Some "notice and demand" statutes impose greater burdens on defendants, such as requiring them to proffer a "good faith" reason for wanting the prosecution to present its testimonial forensic evidence through live testimony. *See, e.g.*, Ala. Code § 12-21-302. Petitioner agrees with the United States (U.S. Br. 31) and the Law Professors (Br. 15 n.3) that such notice-and-demand-plus statues raise serious constitutional questions that should be left for another day. This Court should also leave for another day whether or when the prosecution may comply with the Confrontation Clause by presenting forensic reports through expert witnesses who did not conduct the original analyses. *See* U.S. Br. 27 (noting some of the conflicting lower-court authority on the subject).

fundamental principles of constitutional liberty" exacts a "price [that] is too high." *Bruton v. United States*, 391 U.S. 123, 135 (1968) (quotation marks and citation omitted); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) ("The Sixth Amend-ment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done.") (quotation marks omitted).

For example, in *Bruton*, this Court imposed confrontation restrictions on the use of confessions that discourage joint trials, despite the fact that such trials "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." 391 U.S. at 134. In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court insisted that facts subjecting defendants to increased punishment be proven to juries, noting that its decision could not "turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Id.* at 313. And in *Gideon v. Wainwright*, 372 U.S. 335 (1963), this Court held that all indigent persons accused of felonies are entitled to appointed counsel, notwithstanding the State of Alabama's contention – in language even more alarmist than it advances here – that doing so would impose on states "an unbearably onerous financial burden to pay the fees of attorneys." Br. of Alabama et al. 13, *Gideon v. Wainwright*, 372 U.S. 335 (1963), *available at* 1962 WL 115123; *compare* Br. of Alabama et al. 25-28.

Any burden that states such as Massachusetts might face as a result of complying with the traditional requirements of confrontation in the context of forensic evidence pales in comparison to those imposed by a

case such as *Gideon*.[9] And that burden would be a small price to pay for abiding by a fundamental safeguard of the American trial system – a safeguard that experience shows beyond dispute is necessary in this context, no matter how trustworthy we might want to think forensic science may be.

## CONCLUSION

For the foregoing reasons, as well as those in petitioner's opening brief, the decision of the Appeals Court of Massachusetts should be reversed.[10]

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[9] In 2004, the supervisor of a Massachusetts Department of Public Health drug laboratory asserted that if forensic reports were deemed testimonial, the Department of Public Health would need only "between four to eight additional chemists in order to keep up with the analyses of samples and court appearances." Affidavit of Charles Salemi, *in* Appendix, Br. for the Commonwealth as *Amicus Curiae* 3, *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005). What is more, this estimation appears to be premised on the incorrect assumption that forensic examiners would need to testify in "every narcotics case that goes to trial," *id.*, without the ability to take mitigating measures such as seeking waivers or adopting a notice-and-demand statute.

[10] The Commonwealth requests, in the event this Court holds that petitioner's confrontation rights were violated, that it have the opportunity on remand to argue that the error was harmless beyond a reasonable doubt. Resp. Br. 66. Petitioner disagrees with the Commonwealth's contention, which it is raising for the first time in this Court, that the error could have been harmless. The police testified that they had "no 'real knowledge,'" apart from the forensic reports, that the contents of the bags they seized contained cocaine, Resp. Br. 4 n.1, and the trial court took the unusual step of reserving judgment on the defendant's motion for a required finding of not guilty until after the jury returned its verdict. Tr. 2/227. The Appeals Court of Massachusetts found sufficient evidence to uphold petitioner's conviction in part only

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October 2, 2008

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because of the forensic reports. Pet. App. 8a. Petitioner nonetheless agrees that the proper procedure is for this Court to remand the case for the parties to litigate this issue in the state courts. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 139-40 (1999) (remanding case involving confrontation violation to the state courts for harmless error inquiry).

# AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 07-591

# In the Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ, PETITIONER

*v.*

COMMONWEALTH OF MASSACHUSETTS

*ON WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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## QUESTION PRESENTED

Whether a state laboratory's certificate indicating that items the police had submitted for chemical analysis contained cocaine constituted a testimonial statement within the meaning of the Confrontation Clause of the Sixth Amendment, under *Crawford* v. *Washington*, 541 U.S. 36 (2004).

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# In the Supreme Court of the United States

No. 07-591

LUIS E. MELENDEZ-DIAZ, PETITIONER

*v.*

COMMONWEALTH OF MASSACHUSETTS

*ON WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

### INTEREST OF THE UNITED STATES

This case presents the question whether a certificate issued by a state laboratory indicating that certain substances, submitted to the laboratory by the police for chemical analysis, had been determined to contain cocaine is a "testimonial" statement within the meaning of the Confrontation Clause of the Sixth Amendment, under *Crawford* v. *Washington*, 541 U.S. 36 (2004). Because that question has substantial implications for the conduct of federal criminal trials involving scientific evidence, the United States has a significant interest in the Court's disposition of this case.

## STATEMENT

1. On November 15, 2001, a loss prevention manager at a Boston K-Mart store reported to Detective Robert Pieroway that store employee Thomas Wright was acting suspiciously. After Wright received afternoon telephone calls, he would meet a blue car outside the store, depart briefly in the car, and then return to the store. 9/10/04 Tr. 26-30.

That afternoon, Pieroway parked in front of the store in an unmarked van. Pieroway observed Wright exit the store and enter the back seat of the blue car. Petitioner was in the front passenger seat and Ellis Montero was the driver. As the car moved slowly through the parking lot, Wright leaned forward between petitioner and Montero. Wright then exited the car and returned to the store. Pieroway approached Wright, searched him, and recovered four plastic bags of cocaine, each worth $80 to $100, from Wright's pants pocket. J.A. 20, 25-26; 9/10/04 Tr. 60-70, 73-74.

At Pieroway's instruction, two patrol officers stopped the blue car and arrested petitioner and Montero. Petitioner, Montero, and Wright were handcuffed and transported to the police station in the back seat of one police car. Petitioner and Montero moved around and spoke in Spanish during the trip. After the three arrestees exited the car at the police station, an officer recovered 19 plastic bags of cocaine from the back-seat floor of the cruiser and $320 cash from the ground outside the cruiser. J.A. 36-38; 9/10/04 Tr. 72-73, 144-157, 163-166.

2. Petitioner and Montero were charged by indictment with distributing cocaine and trafficking in 14 grams or more of cocaine. They were tried together before a jury. Pet. App. 1a.

a. A Massachusetts statute requires the state Department of Public Health to chemically analyze substances submitted to it by the police if the analysis will be used for the enforcement of law. Mass. Gen. Laws ch. 111, § 12 (LexisNexis 2004). A separate statute requires the analyst, upon request, to "furnish a signed certificate, on oath, of the result of the analysis * * * to any police officer" and provides that the certificate "shall be prima facie evidence of the composition, quality, and the net weight" of the substance tested. *Id.* § 13.

b. At trial, Detective Pieroway testified that the bags of cocaine recovered from Wright and from the cruiser were analyzed at a state laboratory. Pieroway identified three exhibits as the certificates of analysis created by the laboratory in connection with those drug analyses. The prosecutor moved to admit the certificates. Petitioner's counsel objected, citing *Crawford* v. *Washington*, *supra*. The court admitted the notarized certificates over petitioner's objection. The certificates indicated that on November 28, 2001, the contents of the four bags recovered from Wright and the 19 bags recovered from the police cruiser were analyzed at the state laboratory and were found to contain cocaine. The certificates reflected the net weight of the cocaine and bore signatures of the laboratory employees who conducted the tests. J.A. 27-31; Pet. App. 24a-29a.

c. Petitioner's defense at trial was that the government failed to prove that a drug transfer occurred in the blue car and failed to prove who left the drugs inside the police cruiser. In closing argument, petitioner's counsel told the jury that the government's evidence of distribution consisted solely of a police officer's testimony "that he sees three people in the car, one guy gets in the car, he leans forward. That's it. He leans forward. Certain-

ly that doesn't tell you anything." J.A. 44. With respect to the drugs found in the police car, petitioner's counsel argued:

> [T]he amount of drugs isn't in question. What is in question is who possessed those drugs. Who do you think possessed those drugs? * * * [A]sk yourself, is it Mr. Wright who has the drugs? Is it Mr. Melendez-Diaz who has the drugs? * * * [B]eing in the same room with someone who has drugs is not possessing those drugs.

J.A. 47-48. The jury returned guilty verdicts on all counts. Pet. App. 1a.

3. The Appeals Court of Massachusetts affirmed and the Supreme Judicial Court of Massachusetts denied review. Pet. App. 1a-10a, 11a. The Appeals Court rejected petitioner's argument that admission of the certificates of analysis violated the Confrontation Clause as it was interpreted in *Crawford*. *Id.* at 8a n.3. The court relied (*ibid.*) on the decision of the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Verde*, 827 N.E.2d 701 (Mass. 2005).

In *Verde*, the court held that certificates of analysis "are well within the public records exception to the confrontation clause" and therefore are not "testimonial" evidence under *Crawford*. Pet. App. 18a. The court noted that certificates of analysis "merely state the results of a well-recognized scientific test determining the composition and quantity of the substance" and do not require the public officer analyzing the substance to exercise discretion or form an opinion. *Id.* at 17a. The court also noted that a certificate is admissible by statute "only as prima facie evidence of the composition, quality, and weight of the substance" and could be re-

butted by any defendant who "doubts its correctness." *Id.* at 17a-18a. The court further observed that the admission of a certificate of analysis does not implicate "the principal evil at which the Confrontation Clause was directed[,] . . . particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 18a (quoting *Crawford*, 541 U.S. at 50).

## SUMMARY OF ARGUMENT

The certificates of analysis at issue in this case, which attested to the identity and weight of substances submitted to a state laboratory for examination, are not "testimonial" statements under the Confrontation Clause.

I. This Court's line of cases beginning with *Crawford* v. *Washington*, 541 U.S. 36 (2004), does not resolve the issue in this case, because those cases addressed witness statements analogous to the paradigmatic *ex parte* statements at which the Confrontation Clause was aimed. Scientific evidence generated by laboratory instruments did not exist at the time of the framing, however, and it raises significantly different issues.

II. The common law recognized that official records generated by public officers did not generally require in-person testimony and confrontation to be admissible. Those records, which reflected the observations of public officers made in the course of their duties, were admissible absent a showing of falsity or a personal interest on the part of the public officer. While the official records exception, of course, cannot cover witness statements produced in a police investigation, it does apply to certificates of analysis prepared by public officials charged with a responsibility to conduct chemical analyses and report the results. Experience confirms that

testing results may either exonerate or inculpate a defendant. Certificates reporting those results may be received in evidence as official records, subject to the defendant's right to subpoena witnesses to impeach the results.

III. Even if the official records doctrine were held inapplicable, the certificates of analysis admitted in this case do not contain testimonial statements. The certificates consist of two components: (1) the results of chemical analysis of particular substances, as revealed by laboratory instruments; and (2) the certification by a laboratory employee of those instrument-generated results. Neither component is testimonial. Laboratory instruments are not human beings and thus are not "witnesses" within the meaning of the Confrontation Clause. And the instrument operators' certification of those instrument-generated results is akin to the sort of routine authentication of non-testimonial records that has long been exempt from cross-examination requirements. Just as the raw data produced by an instrument is non-testimonial, the instrument operator's essentially verbatim report of that raw data is also not testimonial.

Sound reasons counsel against straining to treat routine chemical-analysis reports as though they were the modern-day fruits of a Marian examination. Defendants frequently have no interest in cross-examining a laboratory employee about a routine report (which reflects the indisputable output of a laboratory instrument). But defendants may secure a strategic advantage by forcing the government to call the witness on the chance that he cannot be located. Moreover, the exercise—particularly for prosecution offices with numerous cases relying on routine, instrument-generated laboratory results and the laboratories that must conduct the tests—consumes

scarce criminal justice resources, with little or no countervailing benefit to the truthseeking process.

IV. Finally, even if the presentation of scientific test results through the certificates of analysis in this case were held impermissible, such a holding should not be understood to cast doubt on other procedures that foster efficiency while safeguarding any applicable cross-examination rights. These include the use of a testifying expert to provide opinion testimony concerning the results of scientific testing conducted by others and notice-and-demand statutes that afford an opportunity for cross-examination if the defendant makes a timely demand.

## ARGUMENT

### THE ADMISSION OF THE CERTIFICATES OF ANALYSIS AT ISSUE IN THIS CASE DID NOT VIOLATE THE CONFRONTATION CLAUSE

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. The certificates of analysis at issue here, which were prepared by a state laboratory performing scientific tests as required by law, do not fit within the category of "testimonial" statements covered by the Clause under *Crawford* v. *Washington*, 541 U.S. 36 (2004). The decision below should therefore be affirmed.

#### I. Scientific Analysis Of Evidence By State Laboratories Raises Issues Not Resolved By *Crawford*

In *Crawford*, this Court held that the Confrontation Clause prohibits the introduction of testimonial hearsay statements of an absent witness at a criminal trial unless the witness is unavailable and the defendant had a prior

opportunity to cross-examine the witness. The Court did not provide a comprehensive definition of the term "testimonial statement" but it noted that it "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68-69. In *Davis* v. *Washington*, 547 U.S. 813, 824 (2006), the Court made clear that testimonial hearsay "mark[s] out not merely [the] 'core[]' [of the Confrontation Clause,] but its perimeter."

Until now, the Court has applied the "testimonial statement" standard it announced in *Crawford* only to statements made to police officers by eyewitnesses to alleged criminal conduct.[1] With the exception of the emergency circumstances presented in *Davis*, which the Court held did *not* generate testimonial statements, the scenarios closely resembled the civil-law practice that was the "principal evil" that the Confrontation Clause was intended to curtail: the admission into evidence of the *ex parte* examination of a witness to criminal conduct conducted by a government investigator (formerly mag-

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[1] In *Crawford* itself, the Court held that the Confrontation Clause was violated by the admission at trial of a woman's tape-recorded statements made during a custodial police interrogation describing a stabbing committed by her husband, the defendant. 541 U.S. at 38, 68-69. In *Davis*, the Court held that a recorded 911 call in which a woman described her former boyfriend's ongoing assault upon her and sought emergency help from the police was not testimonial and, thus, its admission did not violate the Confrontation Clause. 547 U.S. at 827-828. In the consolidated case of *Hammon* v. *Indiana*, No. 05-5705, the Court held that the Confrontation Clause *was* violated by the admission of a second woman's oral statements to a police officer in her home describing an assault that her husband had committed upon her earlier, where no emergency existed when the statements were made and the objective primary purpose of the officer's interrogation was to investigate potentially criminal past events. *Id.* at 829-830.

istrates, but now primarily police officers) without providing the accused person the opportunity to cross-examine the witness. See 541 U.S. at 50.

Unlike *Crawford* and *Davis*, this case does not involve the admission of an out-of-court statement by a witness to criminal conduct or police questioning. The witnesses to petitioner's criminal conduct were the police officers who observed petitioner's encounter with Wright and the events surrounding the post-arrest transport of petitioner, Wright, and Montero. Those witnesses all testified at trial and were cross-examined. The Confrontation Clause issue here instead involves the results of scientific tests conducted on evidence collected by the police in a criminal investigation.

Founding-era history does not provide a direct answer to the question whether the result of a scientific test on evidence collected in a criminal investigation is testimonial hearsay covered by the Confrontation Clause because the Founders were not familiar with such evidence. Forensic science—"the application of the natural and physical sciences to the resolution of conflicts within a legal context," 4 David L. Faigman et al., *Modern Scientific Evidence*, § 29:2 (2007)—is, in all respects implicated here, a post-founding phenomenon. The 1752 English trial of Mary Blandy for the murder-by-poisoning of her father included testimony concerning rudimentary observational tests a doctor performed to conclude that a powder that the defendant discarded was arsenic, and that case may be the first criminal trial to employ forensic evidence of that type. *The Trial of Mary Blandy*, 18 How. St. Tr. 1117, 1139-1140. But the foundational discoveries of modern forensic science, and thus the factual basis for the issue now before the Court,

came much later.[2] The drafters of the Confrontation Clause could not have anticipated that two centuries later, millions of DNA profiles would be contained in a national database, FBI, U.S. Dep't of Justice, *Pub. No. 0357, FBI Laboratory 2005 Report* 32 (*2005 FBI Laboratory Report*) (visited Sept. 9, 2008) <http://www.fbi.gov/hq/lab/labannual05.pdf>, or that toxicologists would identify controlled substances using instruments capable of separating and identifying the substances' molecular components, see 2 Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evidence* 488-494, 525-533 (4th ed. 2007) (*Scientific Evidence*) (describing gas chromatography and mass spectrometry techniques for drug identification).

Because *Crawford* dealt with evidence that was generated in ways that had "a striking resemblance to examinations of justices of the peace in England" under the Marian bail and committal statutes, see 541 U.S. at 52, the Court did not have to venture an opinion about how the Confrontation Clause should apply to the far different evidence that results from laboratory testing. The resolution of that issue should turn not on petitioner's unpersuasive analogy of laboratory reports to witness affidavits, Pet. Br. 16-17, but rather on the textual, historical, and practical considerations relevant to

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[2] For instance, it was not until the second half of the 19th century that scientists would understand that fingerprints do not change over time and thus could be used as a method of identification for law-enforcement and other purposes. See William J. Herschel, *The Origin of Finger-Printing* 22-31 (1916). The Federal Bureau of Investigation (FBI) had no laboratory until 1932. Kim Waggoner, *The FBI Laboratory: 75 Years of Forensic Science Service* 1-2 (*75 Years*) <http://www.fbi.gov/hq/lab/fsc/backissu/oct2007/research/2007_10_research01_test1.htm>. It was only 20 years ago that the FBI Laboratory conducted its first DNA analysis on evidence. *Ibid.*

evidence generated by laboratory employees utilizing scientific instruments.

**II. The Certificates of Analysis In This Case Fit Within The Official Records Exception**

The certificates of analysis admitted in this case represent official records generated and used as provided by law. As respondent explains (Massachusetts Br. 36-45), the common law recognized official records as an exception to the requirements of in-person testimony and confrontation. The official records exception permitted the admission of "official registers or records kept by persons in public office in which they [were] required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observation." *Evanston* v. *Gunn*, 99 U.S. 660, 666 (1878) (citations omitted). The official records exception is rooted in a "presumption that public officers do their duty." 5 John Henry Wigmore, *Evidence in Trials at Common Law* § 1632, at 618 (James H. Chadbourn rev. ed. 1974) (Wigmore). "The fundamental circumstance is that an official duty exists to make an accurate statement, and that this special and weighty duty will usually suffice as a motive to incite the officer to its fulfillment." *Ibid.* Accord Thomas Starkie, *A Practical Treatise of the Law of Evidence* 273 (Dowdeswell & Malcolm eds., 10th Am. ed. 1876).

The official records exception was applied at common law to admit records created pursuant to a public duty, including in criminal proceedings where those records proved a fact essential to the government's case. See *The King* v. *Aickles*, 168 Eng. Rep. 297, 297-298 (1785) (in proceeding to reinstate conviction and sentence

based on violation of condition of pardon that prisoner remain exiled in America for seven years, and where it was "incumbent on the prosecutor to prove the precise day on which the prisoner was discharged," prison records admitted showing names of prisoners brought into the prison and time of their discharge). Official records could be excluded based on evidence that the records were falsified or that the public officer had a personal interest in the matter being recorded. *Id.* at 298 (noting that "[a]ny person may undoubtedly falsify the entries if they can; but unless the truth of the entry as to the present fact can be impeached, it is admissible evidence"); 5 Wigmore § 1633, at 624 ("in a given case, circumstances may justify the exclusion of an official statement where a strong motive to misrepresent appears to have existed"). But the foreseeable use of the record in litigation was not identified as an independent ground for exclusion. For instance, the exception at common law encompassed "inquisitions" conducted under express public authority relating to matters of public interest, such as "*post mortem*" inquisitions to determine the heirs and estate of a deceased person. *Id.* § 1670, at 793. It is foreseeable that those reports would be pertinent to litigation, but they were "always received and highly valued." *Ibid.* The common law exception for official records also included "certificates" that were "given out by [the public official] to an applicant for the latter's use," so long as there was "*express authority*" to issue the certificate. *Id.* §§ 1636, 1674, at 646, 823. The particular use to which the "applicant" would put the certificate was not dispositive; the applicability of the exception instead focused on the authority granted to the public officer.

Of course, the public records exception cannot be used to admit hearsay witness statements gathered in a police investigation (as took place in *Crawford* itself). But the certificates of analysis admitted in this case do not reflect hearsay statements of ordinary witnesses who observed criminal activity. Rather, they conform to the common law exception for official records because state laboratory employees are public officers who have a statutory duty to record and report information generated from their own tests. See Mass. Gen. Laws ch. 111, § 12 (requiring chemical analysis of substances submitted by the police if the analysis will be used for the enforcement of law); *id.* § 13 (requiring provision of signed certificate, under oath, of the analytical results). Those public officers have an official duty to conduct and report their analyses accurately, and "[i]t [was] the influence of the official duty, broadly considered, which [was] taken as the sufficient element of trustworthiness" at common law. 5 Wigmore § 1632, at 618. The laboratory employees as a group have no personal interest in the outcome of the analyses that would disqualify their reports as official records. As one indication, in 2007 a total of 2650 drug evidence exhibits analyzed by the Drug Enforcement Administration laboratory yielded results that showed either no drug at all or identified a drug that was not a controlled substance. In other words, the results were exculpatory. Accordingly, as the *Verde* court held, certificates of analysis "are well within the public [or official] records exception to the confrontation clause," Pet. App. 18a, subject, of course, to the

defendant's right to subpoena witnesses to impeach their results.[3]

### III. The Certificates Of Analysis In This Case Reflect The Output Of A Scientific Instrument, As Attested To By The Instrument's Operator, And Are Therefore Not Testimonial

Even if the official records doctrine did not take the certificates of analysis in this case outside the coverage of the Confrontation Clause, the certificates at issue still do not contain "testimonial statements" under *Crawford*. The certificates state that the substances submitted by the police "[h]a[d] been examined" with the result that "[t]he substance[s] w[ere] found to contain" cocaine, with specified net weights. Pet. App. 24a-29a. The certificates thus embody (a) the results of chemical analysis by laboratory testing, and (b) the report on those results

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[3] Accord *Smith* v. *Mott*, 100 So. 2d 173, 174-176 (Fla. 1958) (report of alcoholic content of blood issued by state department of health was admissible as official record); *Commonwealth* v. *Slavski*, 140 N.E. 465, 468-469 (Mass. 1923) (certificates of state department of health offered to prove alcoholic content of substance were admissible as official records); *Bracey* v. *Commonwealth*, 89 S.E. 144, 144-145 (Va. 1916) (same); *State* v. *Torello*, 131 A. 429, 429-431 (Conn. 1925) (same). In addition, after *Crawford*, courts have widely and correctly held that regularly-kept maintenance records relating to laboratory instruments, which are prepared on a scheduled basis established by statute or regulation and which must be prepared without regard to whether the instrument has been utilized or whether the record will be used in litigation, or certificates attesting to the fact that a machine was tested and found to be in working order, are business records, official records, or their equivalents and do not contain "testimonial statements" subject to the Confrontation Clause. See, *e.g.*, *Rackoff* v. *State*, 637 S.E.2d 706, 709 (Ga. 2006); *Bohsancurt* v. *Eisenberg*, 129 P.3d 471, 474-480 (Ariz. Ct. App. 2006). See generally *Palmer* v. *Hoffman*, 318 U.S. 109, 115 (1943).

by laboratory employees. Neither of those categories of information, on this record, should be held to constitute a testimonial statement.

### A. Laboratory Instruments Do Not Produce Testimonial Statements

1. In *Crawford*, the Court held that the term "witnesses" in the Confrontation Clause refers to those who "bear testimony." 541 U.S. at 51 (quoting 2 Noah Webster, *An American Dictionary of the English Language* 114 (1828) (Webster)). "Testimony," the Court explained, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* (quoting Webster 91). The same dictionary relied on by the Court in *Crawford* defines "solemn" as "affecting with seriousness; impressing or adapted to impress seriousness." Webster 75. Solemnity and seriousness are human traits. The "witnesses" to whom the Confrontation Clause refers, therefore, must be "*human* witnesses." *United States* v. *Lamons*, 532 F.3d 1251, 1263 (11th Cir. 2008). That conclusion is reinforced by Federal Rule of Evidence 801(a), which defines a "statement" for hearsay purposes as an oral or written assertion or nonverbal conduct of a *person* if it is intended by the *person* as an assertion. See *United States* v. *Washington*, 498 F.3d 225, 230 & n.1 (4th Cir. 2007) (finding definition of "statement" in Rule 801(a) to be "uncontroversial" for Confrontation Clause purposes in light of reference in Sixth Amendment to "right to confront (human) 'witnesses'"), petition for cert. pending, No. 07-8291 (filed Dec. 14, 2007). Petitioner does not dispute that a "witness" for Confrontation Clause purposes is "a *person* who gives testimony." Pet. Br. 13

(emphasis added). And, of course, a machine is not a person.

2. The distinction between human witnesses, the sole concern of the Confrontation Clause, and laboratory instruments, which also can produce information introduced as evidence in a criminal trial but which fall outside the textual scope of the Confrontation Clause, is critical to this case. Testing results that contain no human assertion are not "statements" at all, and therefore cannot be "testimonial statements" for Confrontation Clause purposes. See, *e.g.*, *Wimbish* v. *Commonwealth*, 658 S.E.2d 715, 719-720 (Va. Ct. App. 2008) (breath-test result generated by a machine was not a statement made by a witness); *State* v. *Weber*, 19 P.3d 378, 381 (Or. Ct. App. 2001) (photo radar instruction setting forth speed of vehicle was not hearsay because it was generated by a machine and was not an assertion by a person); *Stevenson* v. *State*, 920 S.W.2d 342, 343 (Tex. Ct. App. 1996) (intoxilyzer printout was not hearsay because it was self-generated by the instrument, which is not a declarant).

A person's *interpretation* of ambiguous test results or his *application of judgment* to instrument-generated data raises different questions. But where the role of the person is limited to turning on the instrument, supplying the material to be tested, and reading the result that the instrument has produced, the answer provided by the instrument contains no assertion by the human operator and is not a "statement." This is plainly true of machine-generated results such as a photograph taken by a red-light camera. It is equally true of more sophisticated results, such as a chromatogram or mass spectrum generated by a gas chromatograph/mass spectrometer instrument used for drug identification. See *Lamons*, 532 F.3d at 1263-1264 & n.23 (phone-bill data auto-

matically recorded onto data reel were not statements of persons; "certain statements involve so little intervention by humans in their generation as to leave no doubt that they are wholly machine-generated for all practical purposes"); see generally *Scientific Evidence* 488-492, 525-530 (depicting and describing chromatogram and mass spectrum and noting that a computer equipped with a library of the mass spectra of known compounds can automatically interpret the spectrum of the unknown substance by comparing it to the library of known spectra). An instrument that issues its own self-evident report is not a "witness" for Confrontation Clause purposes. Accordingly, the direct results of instrument-based testing in the laboratory are not testimonial statements under the Confrontation Clause.[4]

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[4] See *Washington*, 498 F.3d at 229-230 (raw data generated by gas chromatograph used to detect alcohol in blood sample are "'statements' *of the machines* themselves, not their operators" and are not subject to the Confrontation Clause); *United States* v. *Moon*, 512 F.3d 359, 362 (7th Cir. 2008) (instrument readouts from infrared spectrometer and gas chromatograph used to identify cocaine "are not 'statements' in any useful sense"), petition for cert. pending, Nos. 07-1251, 07-10255 (filed Apr. 2, 2008); *State* v. *Chun*, 943 A.2d 114, 169-170 (N.J. 2008) (Alcohol Influence Report generated automatically by Alcotest machine was not testimonial because, *inter alia*, the operator could not influence the machine's report and the machine could have no intent to advance a prosecution; court also observed that "[s]urely the Founding Fathers did not envision the day when a device that cannot itself be cross-examined would be the equivalent of a witness"), petition for cert. pending, No. 07-1562 (filed June 13, 2008); cf. *United States* v. *Hamilton*, 413 F.3d 1138, 1142-1143 (10th Cir. 2005) ("header" information generated automatically by computer upon uploading of pornographic image to newsgroup involved neither a "statement" nor a "declarant" and was not hearsay).

### B. The Operators Of Laboratory Instruments May Attest To The Instruments' Proper Operation And Test Results Without Generating Testimonial Statements

If the Commonwealth in this case had introduced into evidence the raw data produced by a laboratory instrument, that evidence would not have constituted a testimonial statement, for the reasons described above. The constitutional analysis does not change simply because state law allows the results of the same examination to be introduced through a laboratory employee's certificate or because the certificate is prepared for use in a criminal case. Documents that simply authenticate records that are not themselves testimonial, or that transmit data evident from such non-testimonial records, are non-testimonial statements for purposes of the Confrontation Clause.

1. This Court's cases establish the principle that an authentication certificate prepared for a legal proceeding does not, by itself, automatically constitute a testimonial statement. In *Davis*, the Court identified *Dowdell* v. *United States*, 221 U.S. 325 (1911), as an example of an early American case that did not involve "testimonial" statements of "witnesses" under the Confrontation Clause. 547 U.S. at 825. In *Dowdell*, the Supreme Court of the Philippine Islands had supplemented the trial record in a criminal case with certificates from the clerk of court, the trial judge, and the court reporter indicating that their records showed that the defendants had entered not-guilty pleas and had been present at trial. The *Dowdell* Court rejected the defendants' claim that use of the certificates violated the Confrontation Clause and an equivalent provision of a federal statute that contained a "Philippine Bill of Rights." The Court explained that the "general rule of law embodied" in the

Confrontation Clause "ha[d] always had certain well recognized exceptions," one of which was the principle that "[d]ocumentary evidence to establish collateral facts, admissible under the common law, may be admitted in evidence." 221 U.S. at 329-330. The Court held that the court officials who executed the certificates in *Dowdell* "were not witnesses against the accused" within the meaning of the Confrontation Clause because they "were not asked to testify to facts concerning [the defendants'] guilt or innocence." *Id.* at 330. *Dowdell* establishes that the fact that certificates are prepared in lieu of testimony for use at trial (or, in that case, to supplement the record of the trial) does not mean that those statements are "testimonial" ones subject to the Confrontation Clause.

Similarly, certificates of authenticity and "certificates of nonexistence of record" (CNRs) are certificates prepared for the sole purpose of being introduced at trial. But at common law, a certificate attesting that a document was a true copy of an original found among the public records where such documents were kept was admissible as evidence of the existence and authenticity of the public record. See Fed. R. Evid. 902(4), advisory committee's note ("The common law * * * recognized the procedure of authenticating copies of public records by certificate."); 5 Wigmore § 1678, at 863. Cross-examination of the author of the certificate was not required. Where the underlying public and business records in such cases were nontestimonial, the certificate authenticating them was also "nontestimonial" hearsay exempt from the Confrontation Clause, even though it clearly was generated to prove a fact in a particular case. See, *e.g.*, *United States* v. *Adefehinti*, 510 F.3d 319, 327-328 (D.C. Cir. 2008) (certificates authenticating bank re-

cords were not testimonial); *United States* v. *Ellis*, 460 F.3d 920, 927 (7th Cir. 2006) (certificate authenticating hospital records "is nontestimonial just as the underlying business records are"). CNRs, which certify that a record that would be kept in the course of an organization's regularly conducted activities did not exist in the entity's files, have also been admitted based on similar logic. The underlying principle is that, where a class of records is non-testimonial, a certificate reflecting the contents of those records, or the absence of a record from those contents, is no more testimonial than the records themselves. See *United States* v. *Urqhart*, 469 F.3d 745, 748 (8th Cir. 2006); *United States* v. *Cervantes-Flores*, 421 F.3d 825, 830-834 (9th Cir.), cert. denied, 547 U.S. 1114 (2005); *United States* v. *Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005).

2. That principle applies in this context as well. The operator of a laboratory instrument who merely attests to its output does not add testimonial content to the underlying data. Rather, he effectively functions as a reporter, relaying the nontestimonial instrument-generated results to a court. Just as a representative of an entity may certify the existence and authenticity of the entity's non-testimonial records, a laboratory employee may certify the existence and authenticity of a laboratory instrument's results. In neither context does the individual performing the authentication function generate "testimonial" statements. Instead, that individual produces a non-testimonial certificate that permits the admission of underlying non-testimonial information.

As in *Dowdell* and the authentication and CNR contexts discussed above, the Confrontation Clause does not treat such laboratory certificates as "testimonial" statements. Indeed, courts in the United States have

long allowed certificates in criminal cases to prove similar facts that are ascertainable without the exercise of discretion or judgment by the certifying public officer. See, *e.g.*, *T'Kach* v. *United States*, 242 F.2d 937, 937-938 (5th Cir. 1957) (in prosecution for impersonating a federal officer or employee, affidavit of personnel officer and custodian of records of White House stating that no record showed that the defendant was employed as a personal representative of the President was admitted and did not violate Confrontation Clause); *Bracey* v. *Commonwealth*, 89 S.E. 144, 144-145 (Va. 1916) (in prosecution for selling ardent spirits without a license, admission of certificate of state chemist showing analysis of beverage sold by the defendant did not violate confrontation rights); *United States* v. *Benner*, 24 F. Cas. 1084, 1085 (C.C.E.D. Pa. 1830) (No. 14,568) (in prosecution for arresting and imprisoning a foreign minister, certificate of Secretary of State indicating that the victim was an attache to the legation of Denmark properly admitted to show victim's status).

### C. Admission Of The Certificates Of Analysis In This Case Did Not Violate The Confrontation Clause

Applying those principles here, the admission of the certificates of analysis in this case was constitutional. Although the certificates were prepared for trial in the course of a police investigation, the record does not demonstrate that they contained "testimonial statements."

1. As petitioner acknowledges (Br. 7), each certificate of analysis conveyed only that a substance provided to the laboratory by a police officer (1) was "examined," (2) "was found to contain" cocaine, and (3) had an identified net weight. Pet. App. 24a-29a. Nothing in the certificates indicates that they represent more than (1) the

result generated by a scientific instrument designed to chemically analyze a substance and determine its weight; and (2) a laboratory employee's report of those instrument-generated results. For the reasons discussed above, the "statement" of a laboratory instrument that a substance contained cocaine of a particular weight is not testimonial. And the fact that the information is conveyed by a laboratory employee's certificate, rather than a print-out or screen-shot of the instrument's direct output, does not change the Confrontation Clause analysis.[5]

2. The record in this case contains no information about the "examination" that was conducted on the controlled substances. The record does not reveal whether the examination was performed entirely by an instrument, by a person applying substantial judgment to otherwise-unintelligible raw data, or some combination of the two. In *Verde*, the court concluded that equivalent certificates of analysis executed under Massachusetts law were not "testimonial statements" subject to the Confrontation Clause because they "are neither discretionary nor based on opinion" and "merely state the results of a well-recognized scientific test determining the composition and quantity of the substance." Pet. App. 17a. To the extent that the record permits *any* inference about the nature of the information contained

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[5] The certificate's report of drug weight illustrates the point. A digital scale may provide a reading of the weight of a substance that requires no human interpretation to understand. If a scale were equipped with a printer, the printed record of the item's weight would not be a testimonial statement; it would be the "statement" only of an instrument, the digital scale. Nothing in the constitutional analysis should change simply because a human laboratory employee reports the same instrument-generated result in the form of a certificate.

in the certificates of analysis admitted in this case, the inference is, as *Verde* suggests, that the "examination" documented in the certificates produced an instrument-generated result, with a human authenticator. And if the information contained in the certificates of analysis are not testimonial statements of witnesses, the mere use of the certificates as vehicles for conveying that information to the jury does not change the character of the evidence under the Confrontation Clause. Thus, the certificates cannot be described as "testimonial statements" of "witnesses" for Confrontation Clause purposes.

Petitioner now challenges (Br. 12) the "Massachusetts' courts' supposition that forensic reports are purely objective" and contends that "[s]uch reports reflect complicated, subjective interpretations of imprecise scientific tests." That challenge comes far too late. Petitioner never challenged the reliability of the test results in the trial court, as he could have. He did not even argue to the jury that the certificates of analysis were of no meaning without information concerning the type of tests that were performed and their reliability. He did the opposite and conceded that the *prima facie* showing of the drugs' identity and weight reflected in the certificates was proof beyond a reasonable doubt: "[T]he amount of drugs isn't in question." J.A. 47. In addition, while petitioner now asserts (Br. 32) that "there are at least *seventeen different methods* currently used for analyzing seized substances for the presence of drugs," he cites nothing to indicate that the method used in this case generated a "testimonial statement" of a human "witness" within the meaning of the Confrontation Clause. He cannot challenge the admissibility of the certificates of analysis based only on speculation that

they contain underlying human judgment applied to readings produced by a laboratory instrument.

3. A holding that would bar certificates attesting to routine drug-testing results obtained directly from laboratory instruments would inflict serious harms to important public interests in criminal prosecutions, without producing offsetting benefits. In federal and District of Columbia cases, for instance, the Drug Enforcement Administration analyzed 52,948 controlled substance exhibits in fiscal year 2007.[6] In the government's experience, most defendants do not challenge through cross-examination the determination of the substance involved or its laboratory-determined weight. An inflexible Confrontation Clause requirement to produce the laboratory employee who operated the instrument would impose significant resource costs on the government, with little benefit to defendants (who would often choose not to cross-examine or would simply stipulate to the relevant facts once the laboratory employee has appeared in court).

In other contexts, a requirement to produce the person who conducted a test might foreclose prosecution altogether. Forensic testing frequently produces data whose evidentiary value may emerge only years later. See, *e.g.*, *75 Years*, *supra* note 2, at 1 (describing five-year time lapse between discovery of bodies of three teenage murder victims in Spotsylvania County, Virginia, and initial DNA tests and the closure of the case through additional scientific testing when the suspect attempted to abduct another teenager). At that time, the particular laboratory employee may be entirely unavail-

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[6] See DEA, *Laboratories* (visited Sept. 9, 2008) <http://www.usdoj.gov/dea/programs/laboratories.htm>.

able. And retesting may be impossible (*e.g.*, because the testing process consumed the available biological or other material). If the death or unavailability years later of the operator of a laboratory instrument rendered the instrument-generated result inadmissible, the truth-seeking process would be frustrated—even though the defendant would have had little or no cross-examination for a live witness had one appeared. The Confrontation Clause does not require that result.

## IV. The Confrontation Clause Does Not Mandate Automatic Production In Court Of All Participants In The Process Of Scientific Testing

Even if the Court were to conclude that presentation of scientific test results through the certificates of analysis in this case violated the Confrontation Clause, it should leave room for other procedures that foster efficiency while safeguarding any applicable cross-examination rights. These include the use of a testifying expert to provide an opinion concerning the results of scientific testing conducted by others and notice-and-demand statutes that afford an opportunity for cross-examination if the defendant indicates that he desires it.

### A. The Confrontation Clause Permits Expert Opinion Testimony To Be Based On The Records Of Scientific Tests Conducted By Others

1. Federal Rule of Evidence 703 provides that an expert witness may base an opinion or inference on facts or data "perceived by or made known to the expert at or before the hearing." The facts or data on which the expert relies "need not be admissible in evidence in order for the opinion or inference to be admitted" if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the

subject." Fed. R. Evid. 703. The goal of Rule 703 is to "bring the judicial practice [regarding expert testimony] into line with the practice of the experts themselves when not in court." Fed. R. Evid. 703 advisory committee's note to 1972 Proposed Rules. In other words, an expert should be able to base the opinion he or she offers in the courtroom on the same facts or data that he or she would rely upon in other professional settings, so long as that reliance is reasonable. *Ibid.*

Because of the prejudice that could result from exposing the jury to inadmissible evidence, Rule 703 instructs courts not to permit disclosure of otherwise inadmissible facts or data relied upon by an expert witness "unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703; see also Fed. R. Evid. 705 (providing that an expert may testify to an opinion without first testifying to the underlying facts or data). When otherwise inadmissible facts or data underlying an expert's opinion are disclosed to the jury under Rule 703, they are admitted for the limited purpose of assisting the jury to decide what weight, if any, to give the expert's opinion and may not be considered by the jury as substantive evidence.[7]

2. *Crawford* "did not involve expert witness testimony and thus did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inad-

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[7] See Fed. R. Evid. 703 advisory committee's notes to 2000 Amendments (noting also that appropriate limiting instruction must be given by the court upon request); see also *Wilson* v. *Merrell Dow Pharms. Inc.*, 893 F.2d 1149, 1153 (10th Cir. 1990) (applying rule of limited admissibility before 2000 amendment to Rule 703); *United States* v. *Dukagjini*, 326 F.3d 45, 58 (2d Cir. 2003) (citing cases applying same), cert. denied, 541 U.S. 1092 (2004).

missible evidence in formulating his opinion under Federal Rule of Evidence 703." *United States* v. *Henry*, 472 F.3d 910, 914 (D.C. Cir.), cert. denied, 128 S. Ct. 240 and 128 S. Ct. 247 (2007). *Crawford* also made clear that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 60 n.9 (citing *Tennessee* v. *Street*, 471 U.S. 409, 414 (1985)). When otherwise inadmissible facts or data underlying an expert's opinion are admitted into evidence for the limited, non-hearsay purpose of assisting the jury to evaluate the expert's opinion, the Confrontation Clause is not implicated, regardless of whether the facts or data include "testimonial statements" of witnesses not present at trial. See *State* v. *Tucker*, 160 P.3d 177, 194 (Ariz.), cert. denied, 128 S. Ct. 296 (2007); *People* v. *Thomas*, 30 Cal. Rptr. 3d 582, 587 (Ct. App. 2005); *State* v. *Bunn*, 619 S.E.2d 918, 920-921 (N.C. Ct. App. 2005); but see *People* v. *Goldstein*, 843 N.E.2d 727, 732-733 (N.Y. 2005) (rejecting the distinction between a statement offered as substantive evidence and a statement offered to shed light on an expert's opinion), cert. denied, 547 U.S. 1159 (2006).

The Confrontation Clause and Rule 703 thus permit a qualified expert in forensic chemistry to review the records of laboratory work conducted by others on a suspected controlled substance, and any instrument output generated during that testing process, and testify to his opinion concerning the identity of the controlled substance that was tested, provided that those records and output are reasonably relied upon by experts in the field. See, *e.g.*, *United States* v. *Moon*, 512 F.3d 359, 361 (7th Cir. 2008), petition for cert. pending, Nos. 07-1251, 07-10255 (filed Apr. 2, 2008); *Dunn* v. *State*, No.

A08A0611, 2008 WL 2684851, *2-*4 (Ga. Ct. App. July 10, 2008). Similarly, a qualified expert in the field of DNA analysis can present an opinion at trial concerning the results of DNA testing, regardless of whether that expert personally participated in the testing process. See, *e.g.*, *State* v. *Crager*, 879 N.E.2d 745, 758 (Ohio 2007), petition for cert. pending, No. 07-10191 (filed Mar. 26, 2008).

Such expert testimony complies with the Confrontation Clause because the expert witness is available for cross-examination, and the only statement being presented to the jury as substantive evidence is the opinion testimony of that testifying expert. See *Crager*, 879 N.E.2d at 757-758; *Tucker*, 160 P.3d at 194; *State* v. *Little*, 654 S.E.2d 760, 763 (N.C. Ct. App. 2008); *Blaylock* v. *State*, No. 06-07-00090-CR, 2008 WL 2038273, *3-*4 (Tex. Ct. App. May 14, 2008); *Sauerwin* v. *State*, 214 S.W.3d 266, 269-270 (Ark. 2005). A defendant is free to challenge the expert's opinion by exposing the fact that the expert is relying on the reported results of testing that he did not conduct or witness. Cf., *e.g.*, *United States* v. *Williams*, 447 F.2d 1285, 1289-1290 (5th Cir. 1971) (describing "intens[e]" cross-examination of expert in property valuation focused on probing the authenticity and accuracy of the sources on which he relied), cert. denied, 405 U.S. 954 (1972).[8]

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[8] Many of the "statements" on which an expert might rely to form his opinion also do not have characteristics of "testimonial statements," which is another reason why expert testimony based on records of the laboratory work of others raises no Confrontation Clause concerns. For instance, a serologist who must determine whether materials contain biological fluids that are suitable for DNA analysis (such as blood or semen) may record notes of the observations he makes or the tests he performs. Working notes of that nature are not intended to "bear

Rule 703 also serves important interests in judicial economy and laboratory efficiency. Scientific evidence often is the product of the combined efforts of laboratory employees (who conduct tests on the evidence and operate the instruments) and a forensic examiner (who, where necessary, evaluates the test results and forms the conclusion that is relevant at trial). See generally *Roberts* v. *United States*, 916 A.2d 922, 937 (D.C. 2007) (describing "team" structure of DNA-testing process at the FBI laboratory). Rule 703 permits scientific evidence to be presented at trial through a single knowledgeable witness who can be cross-examined. That procedure prevents the trial process and the jury from being overwhelmed by the presentation of multiple witnesses for each scientific test result. It also mitigates the substantial resource strain that would be placed on public and private laboratories if entire teams of employees were diverted from their day-to-day work to testify at trials.

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witness" against a criminal defendant. Their purpose is to permit other laboratory employees who receive the evidence to make correct decisions about what to do next. See *People* v. *Rawlins*, 884 N.E.2d 1019, 1034-1036 (N.Y. 2008) (data and report generated by private DNA laboratory were not testimonial statements where technicians contemporaneously recorded their procedures and results to permit verification of their work by reviewers and technicians did not compare the DNA profile they generated to the defendant's), petition for cert. pending, No. 07-10845 (filed May 9, 2008); *People* v. *Geier*, 161 P.3d 104, 140 (Cal. 2007) (concluding that biologist's notes and report were not testimonial and noting that the records were generated as part of a standard scientific protocol and were not themselves accusatory), petition for cert. pending, No. 07-7770 (filed Nov. 14, 2007); *State* v. *Forte*, 629 S.E.2d 137, 142-144 (N.C.) (serologist's report was not testimonial where it facilitated further examination of the evidence and the potential use of the report in court was only one purpose among several served by its creation), cert. denied, 549 U.S. 1021 (2006).

### B. Notice-And-Demand Statutes Adequately Protect Confrontation Rights

In recognition of the fact that scientific evidence introduced in criminal trials often is not disputed and that laboratory work is impeded when employees must appear in court to testify about uncontested matters, a number of States have enacted "notice and demand" statutes. Notice-and-demand statutes "are a formalized means of effectuating a stipulation to the admissibility of matters which often are not in dispute." *State* v. *Cunningham*, 903 So. 2d 1110, 1119 (La. 2005); see *Thomas* v. *United States*, 914 A.2d 1, 9 (D.C. 2006) (District of Columbia notice-and-demand statute was enacted to relieve chemists responsible for analyzing controlled substances from the necessity of appearing at trial when chain of custody and result of analysis are not in dispute; nevertheless, court invalidated the provision on Confrontation Clause grounds), cert. denied, 128 S. Ct. 241 (2007).

Notice-and-demand statutes take a variety of forms. They typically require that, by a specified date before trial, the government serve a copy of the scientific test result on the defense and inform the defense of its intent to offer a certificate of analysis (or, in some cases, the scientific report itself) at trial in lieu of testimony from the laboratory employee who conducted the testing. See, *e.g.*, Ala. Code § 12-21-301 (LexisNexis 2005) (certificate of analysis and notice of intent to offer it at trial must be served on opposing party at least 40 days before trial); La. Rev. Stat. Ann. § 15:501(a) (2005) (requiring notice ten days before trial). Some statutes specify the information that a certificate of analysis must contain; that information can include descriptions of the labora-

tory analyst's background and the tests he or she performed. See, *e.g.*, Ala. Code § 12-21-300 (LexisNexis 2005); Tex. Code Crim. Proc. Ann. art. 38.41 (Vernon 2005). The statutes generally provide that, within a specified time frame, the defense may file a written demand that the laboratory employee be presented as a witness at trial. See, *e.g.*, Alaska Stat. § 12.45.084(e) (2006); Ohio Rev. Code Ann. § 2925.51 (LexisNexis 2006).[9] If a timely demand is filed, the statutes provide either that the certificate of analysis is not admissible at trial (in which case the government must call the witness in its case-in-chief) or that a subpoena will issue for the laboratory witness and the defense may cross-examine the witness in its own case.[10] When no timely demand for the witness's appearance is filed, the statutes provide that the certificate of analysis or scientific report is admissible at trial and constitutes *prima facie* evidence of certain facts, such as the identity and weight of the controlled substance that was tested. See, *e.g.*, Alaska Stat. § 12.45.084(a); Del. Code Ann. tit. 10, § 4330 (1999).

The variations among notice-and-demand statutes may raise different Confrontation Clause issues. But at a minimum, the statutes do not violate the Confrontation Clause when they merely require the defense to demand

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[9] In some cases, the written demand must include a certification by defense counsel that the defense intends to cross-examine the witness in good faith, a statement of the basis upon which the defense intends to challenge the scientific evidence, or both. See, *e.g.*, Ala. Code § 12-21-302; La. Rev. Stat. Ann. § 15:501.

[10] See, *e.g.*, Del. Code. Ann. tit. 10, § 4332 (1999) (when timely written demand is filed by defense, forensic chemist must appear as prosecution witness); Ala. Code. § 12-21-302(a) (party against whom certificate is offered may request hearing to show cause why subpoena should issue for cross-examination).

before trial that the laboratory witness be called to testify. A defense attorney's failure to make a demand constitutes a valid waiver of the defendant's confrontation rights, at least so long as the defendant receives adequate notice that a failure to demand the witness's testimony will waive confrontation rights. Cf. *State* v. *Caulfield*, 722 N.W.2d 304, 313 (Minn. 2006) (finding that state statute provided inadequate notice of consequence of failure to request testimony of laboratory employee).

As this Court has held, "[t]he most basic rights of criminal defendants are * * * subject to waiver[,]" *Peretz* v. *United States*, 501 U.S. 923, 936 (1991), including the right to confrontation, see *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966). Whether and to what extent to cross-examine a witness, and whether to stipulate to a fact in lieu of demanding testimony, are decisions that fall within counsel's control over trial strategy. See *Taylor* v. *Illinois*, 484 U.S. 400, 418 (1988); *Hinojos-Mendoza* v. *People*, 169 P.3d 662, 669 (Colo. 2007), petition for cert. pending, No. 07-9369 (filed Feb. 4, 2008); *Wilson* v. *Gray*, 345 F.2d 282, 287-290 (9th Cir.), cert. denied, 382 U.S. 919 (1965). Notice-and-demand statutes that require counsel to decide before trial whether to confront and cross-examine a laboratory witness, and provide counsel the opportunity to review the written record of the scientific evidence that the government proposes to present at trial in lieu of that witness's testimony, are reasonable state procedural rules for the exercise of a constitutional right. See *Williams* v. *Georgia*, 349 U.S. 375, 382-383 (1955). Notice-and-demand statutes provide exactly what the Constitution guarantees: "an adequate *opportunity* to cross-examine adverse witnesses." *United States* v. *Owens*, 484 U.S. 554, 557 (1988) (emphasis added). "[O]nly the timing of the

defendant's decision is changed." *Hinojos-Mendoza*, 169 P.3d at 668.[11]

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2008

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[11] Massachusetts contends (Br. 54-59) that petitioner had the opportunity to cross-examine the laboratory employees who prepared the certificates of analysis by issuing a subpoena under Mass. R. Crim. P. 17 or by exercising his right to compulsory process. Whether or not those avenues for securing cross-examination are adequate to safeguard Confrontation Clause rights—which is a question that was not reached or decided below—notice-and-demand statutes that simply structure when a defendant must decide whether he desires cross-examination of a laboratory witness do comply with the Confrontation Clause.

# AMICUS CURIAE BRIEF

105

(15)

Supreme Court, U.S.
FILED
SEP 9 - 2008
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No. 07-591

In the
# Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,
*Petitioner*,

v.

COMMONWEALTH OF MASSACHUSETTS,
*Respondent*.

On Writ of Certiorari to the
Appeals Court of Massachusetts

## BRIEF OF THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, KANSAS, KENTUCKY, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WYOMING, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

Whether the written report of a forensic drug analysis is "testimonial" evidence subject to the demands of the Confrontation Clause.

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## INTEREST OF AMICI

Since 2000, state and federal law enforcement officials have arrested more than 11 million persons for possessing or trafficking illegal narcotics. *See* Uniform Crime Report, *Crime in the United States 2000-2006*, Table 29. As the number of arrests escalates, so does the burden on the state and local laboratories charged with analyzing the substances recovered:

| Year | Persons Arrested | Substances Analyzed |
|---|---|---|
| 2000 | 1,579,566 | 532,412[1] |
| 2001 | 1,586,902 | 1,894,610 |
| 2002 | 1,538,813 | 1,798,045 |
| 2003 | 1,678,192 | 1,715,598 |
| 2004 | 1,745,712 | 1,734,658 |
| 2005 | 1,846,351 | 1,749,275 |
| 2006 | 1,889,810 | 1,935,788 |

*See id.;* National Forensic Laboratory Information System ("NFLIS"), *Years 2000-2006 Annual Report*, Table 1.1. As the slow, steady growth of these numbers shows, the war on drugs is far from over.

Nor has it been cheap. In 1998 alone, the States spent $81.3 billion—13.1% of our annual budgets—fighting "substance abuse and addiction." The National Association on Addiction and Substance Abuse, *Shoveling Up: The Impact of Substance Abuse*

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[1]The increase in reported analyses from 2000 to 2001 is attributable to the NFLIS gaining access to statistics from all fifty states beginning in 2001. *See* NFLIS, *Year 2000 Annual Report*, 3.

*on State Budgets*, 9 (2001). Of this amount, $3.6 billion was spent in the state courts, $2.4 billion of which funded drug-related cases in criminal courts. *Id.* at 16.

As stewards of the public's resources, the amici States have two interests. The first is to spend the lion's share of the public's money where it matters most: on the front lines, fighting and preventing continued drug abuse. The second is to keep our technicians in the laboratory, whenever possible, to handle the daily influx of drug analysis requests and to chip away at the backlog of cases that exceeded 135,000 in 2002. Bureau of Justice Statistics, *50 Largest Crime Labs, 2002*, Table 1 (2004), available at http://www.ojp.gov/ bjs/abstract/50lcl02.htm.

The States have adopted two primary methods to accomplish these goals. Forty-two states and the District of Columbia have statutes allowing the introduction of forensic lab reports *in lieu* of live testimony.[2] Alternatively, the States often produce qualified surrogate witnesses at trial to explain testing procedures and to offer opinions based on the original test data when the testing analyst is unavailable due to death, change of employment, or an overwhelming workload. Petitioner's interpretation of the Confrontation Clause threatens—if not destroys—both of these solutions.

To be clear: The States do not seek to evade confrontation. If a criminal defendant wishes to contest the findings contained in a lab report, he can. As outlined *infra* at pages 28-33, each state's

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[2]This figure includes both drug and blood-alcohol analysis statutes because both are affected by this case. A chart outlining these statutes is attached as Appendix A.

statutory scheme, as well as the use of qualified surrogate witnesses, ensures a defendant's opportunity to cross-examine a laboratory technician. But the reality is that in a vast majority of drug cases—this one included—the defendant will *not* contest the composition of the substance at trial. In these uncontested cases, no one's interest is served by a constitutional requirement that the States waste public funds by producing an unwanted witness.

## SUMMARY OF ARGUMENT

Since the Framing, the Court has never extended the bounds of the Confrontation Clause beyond statements given in a courtroom or in response to inquisitorial practices. This is not the case to do so.

1. The Court's present boundary for testimonial statements is supported by the history and purpose of the Confrontation Clause. The Clause was targeted at statements taken during *ex parte* examinations, primarily because examination-based statements were (1) susceptible to prosecutorial bias and (2) granted a statutory exemption from the common law's exclusionary rule for hearsay statements. Other, non-examination-based (*i.e.* "non-testimonial") hearsay statements were sufficiently governed by common law hearsay rules during the Framing era; thus, they were not targets of the Confrontation Clause.

The laboratory reports in the present case fall outside the scope of the Confrontation Clause for two independent reasons. First, the lab reports fit within the hearsay exception for non-testimonial public records as it existed at the time of the Framing. Second, the lab reports are fundamentally different

than statements taken during examinations under the Marian Bail and Committal Statutes, which were the target of the Confrontation Clause. Thus, the admissibility of the lab reports is governed by the flexibility of state hearsay law.

2. The States need this flexibility to deal with the ever-growing number of drug analysis requests. If the Court deems the lab reports in this case to be "testimonial," it should reject Petitioner's absolutist approach to the Confrontation Clause, which deems the "opportunities to cross-examine" provided by state law to be irrelevant and would require the States to produce the testing analyst at every drug-related trial. Adoption of Petitioner's rule would cause systemic gridlock in the State courts and forensic laboratories.

## ARGUMENT

Not one of the 19 cases in which the Court has found confrontation to be required presented circumstances that resemble the facts of this case. Seven times the statement in question was gained in the presence of law enforcement.[3] Eleven times the

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[3]*See Davis v. Washington*, 547 U.S. 813 (2006)(victim's affidavit completed in the presence of police); *Crawford v. Washington*, 541 U.S. 36 (2004)(victim's statements made during police interrogation); *Lilly v. Virginia*, 527 U.S. 116 (1999)(accomplice's statements made during police interrogation); *Lee v. Illinois*, 476 U.S. 530 (1986)(co-defendant's written confession given to police at his arrest); *Roberts v. Russell*, 392 U.S. 293 (1968)(co-defendant's confession to police); *Bruton v. United States*, 391 U.S. 123 (1968)(co-defendant's statements given during interrogations at city jail); *Douglas v. Alabama*, 380 U.S. 415 (1965)(accomplice's written confession to police).

statement was given in a court proceeding.[4] And, once, the statement was secured by a physician's sustained questioning of a 2-year-old child who had been taken into police "custody . . . for protection and investigation." *Idaho v. Wright*, 497 U.S. 805, 809 (1990). In each case, the declarant was either the victim (*Davis*, *Crawford*, *Wright*, *Mancusi*, *Berger*, and *Pointer*), an accomplice (*Lilly*, *Lee*, *Green*, *Russell*, *Bruton*, *Barber*, *Brookhart*, *Douglas*, *Motes*, and *Kirby*), or a witness with personal knowledge of the crime (*Roberts*, *Mattox*, and *Reynolds*). In other words, every statement deemed "testimonial" by the Court emanated from a person conveying personal knowledge of the crime directly to a judge, jury, police officer, or examiner working in conjunction with the police.[5]

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[4]*See Ohio v. Roberts*, 448 U.S. 56 (1980)(witness's preliminary hearing testimony); *Mancusi v. Stubbs*, 408 U.S. 204 (1972)(victim's previous trial testimony); *California v. Green*, 399 U.S. 149 (1970)(accomplice's preliminary hearing testimony); *Berger v. California*, 393 U.S. 314 (1969)(victim's testimony at preliminary hearing); *Barber v. Page*, 390 U.S. 719 (1968)(co-defendant's testimony at a preliminary hearing); *Brookhart v. Janis*, 384 U.S. 1 (1966)(co-defendant's written confession and witness testimony at trial); *Pointer v. Texas*, 380 U.S. 400 (1965)(victim's testimony from a preliminary hearing); *Motes v. United States*, 178 U.S. 458 (1900)(accomplice's written statement taken at a preliminary hearing); *Kirby v. United States*, 174 U.S. 47 (1899)(record of accomplice's guilty pleas in preceding trial); *Mattox v. United States*, 156 U.S. 237 (1895)(witness testimony from previous trial); *Reynolds v. United States*, 98 U.S. 145 (1879)(witness testimony from previous trial).

[5]The physician's inquisition in *Wright* was an act of law enforcement, or certainly akin to one, because the child declarant had been taken into State custody "for protection and investigation," 497 U.S. 805, 809, and the doctor "questioned

Recording the results of a laboratory test is fundamentally different. Neither the machine that generates the data, nor the technician who records it, witnessed or took part in the crime. The looming specter of judges or the police is not present. There is no interrogation. Simply put, there is no "testimony."

## I. THE LABORATORY REPORTS IN THIS CASE ARE NOT TESTIMONIAL.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court identified the "principal evil" targeted by the Confrontation Clause: "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. This conclusion stemmed from the Eighteenth-Century elimination of the statutory hearsay exception provided for *ex parte* examinations under the Marian Bail and Committal Statutes, 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 Phil & M., c. 10 (1555), and their state equivalents. *Crawford*, 541 U.S. at 42-50.

In this case, the flip-side of this Framing-era history is equally important. Marian-style examinations were not the only pre-Framing hearsay exception. When the general exclusionary rule against hearsay solidified after *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (1696), several "classes of hearsay statements continued to be received as before;" that is, without confrontation. 5 J. Wigmore, *Evidence*, § 1426 (Chadbourn rev. 1974). Included within this inaugural class of hearsay exceptions

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the child with a preconceived idea of what she should be disclosing." *Id.* at 818; *cf. Davis*, 547 U.S. at 823 (considering the questions asked by a 911 operator "to be acts of the police").

were "dying declarations," *Crawford*, 541 U.S. at 56, n.6, "statements in furtherance of a conspiracy," *id.* at 56, "business records," *id.*, and "official records." *Id.* at 76 (Rehnquist, C.J. dissenting). *See also* Wigmore, *supra*, § 1426 (listing fourteen hearsay exceptions that "began to be recognized during the 1700's," and a "few remaining ones [that] were not recognized until the 1800's."). Unlike the Marian statutory exception, each of these exceptions applied with full force after the Framing. *See id.*

The States deem this history important for two reasons. First, it shows that out-of-court statements falling within a surviving common law hearsay exception cannot be deemed "testimonial" because the law continued to accept their admission, without confrontation, after the Framing. Second, it suggests the boundary of the Confrontation Clause: statements generated through use of *ex parte* examinations. If (1) "[n]ot all hearsay implicates the Sixth Amendment's core concerns," *Crawford*, 541 U.S. at 51, and (2) the sole change to the common law of hearsay in the Framing era was the elimination of the statutory exception for *ex parte* examinations, then history suggests that the class of hearsay statements "implicated" by the Clause is limited to statements taken in a manner with a "striking resemblance" to Marian-style *ex parte* examinations. *Id.* at 52; *Davis*, 547 U.S. at 830.

Against this backdrop, the States offer two alternative reasons why the Court should not extend the boundaries of the term "testimonial" to encompass the lab reports in this case. First, the reports fall within a surviving common law hearsay exception. Second, the reports bear no resemblance

to statements taken in a Marian-style *ex parte* examination.

### A. The Laboratory Reports in this Case Are Non-Testimonial Public Records.

Public records constituted a common law hearsay exception because (1) a "presumption [existed] that public officials do their duty," Wigmore, *supra* § 1632, and (2) without the exception, "hosts of officials would be found devoting the greater part of their time to attending as witnesses in court . . . [and] the work of administration of government and the needs of the public having business with officials would suffer as a consequence." *Id.* at § 1631. Had Petitioner's case arisen "at the time of the Founding," *Giles v. California*, 128 S. Ct. 2678, 2682 (2008), Massachusetts's lab reports would have been admissible without confrontation for the same two reasons. The lab reports must therefore be non-testimonial.

#### 1. Public Records Are Inherently Non-Testimonial.

In *Crawford*, the Court left open the question of whether statements falling under the common law public records exception are testimonial. *See Crawford*, 541 U.S. at 56. ("Most of the hearsay exceptions covered statements that by their nature were not testimonial."). That said, the Court essentially affirmed that they are not.

The Court noted in *Crawford* that "[t]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless . . . the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. Addressing the

public records exception after the Framing, this Court stated, "Such writings are admissible in evidence on account of their public nature, though their authenticity be not confirmed by the usual tests of truth; namely, the swearing and the cross-examination of the persons who prepared them." *Gaines v. Relf*, 12 How. (53 U.S.) 472, 570 (1851). If (1) testimonial statements must have been subjected to cross-examination to be admissible at the time of the Framing and (2) public records were admissible without being subjected to cross-examination shortly after the Framing, then public records must be non-testimonial.

### 2. The Laboratory Reports in this Case Would Have Been Public Records at the Time of the Founding.

That leaves the dispositive question: Would the lab reports in this case have qualified as public records "at the time of the Founding"? *Giles*, 128 S. Ct. at 2682. To answer this question, we turn to the "[c]ases and treatises of the time" to find the elements of the Framing-era public records exception. *Id.* at 2684.

In his 1802 treatise, Leonard McNally stated the exception as follows: "The books of public offices, and of public bodies, which of course are not interested in the event of the trial, are admissible evidence."[6] Leonard MacNally, *The Rules of Evidence on Pleas of the Crown, Trials and Cases* 475-77 (1802). In his

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[6]In addition to books, the public records exception embraced "a single document made separately for each transaction," including documents "given out by [the official] to an applicant for the latter's use." 5 J. Wigmore, *Evidence* § 1636 (Chadbourn rev. 1974).

1827 treatise, Thomas Starkie similarly stated that "[c]ertificates and other documents made by persons [e]ntrusted with authority for the purpose . . . are evidence against all, to the extent of the author's authority, of the facts which he is directed to certify." 1 Thomas Starkie, *Evidence* 172 (1826).

These post-Framing treatises fall in line with a criminal case decided shortly before the Framing. In *King v. Aickles*, 168 Eng. Rep. 297, 1 Leach 390 (1785), the defendant was charged with prematurely returning from overseas exile after being discharged from prison. To prove Aickle's date of discharge, the court admitted a copy of a turnkey's entry showing Aickle's release date. The court's decision was affirmed because "whatever acts [public officials] do in discharge of their duty may be given in evidence and shall be taken as true. . . . In the present case, [the clerk of papers] has no private interest whatsoever in this book to induce him to make fictitious entries in it." *Id.*[7]

Taken together, these sources establish the following test for the common law public records exception:

1. The creator of the document is a public servant who has a public duty to perform;

2. The statement contained within the document relates to the performance of the creator's public duty; and,

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[7]As quoted in J. Wigmore, *Select Cases on the Law of Evidence*, 637 (1912).

3. The creator of the report cannot have a private or special interest in the record or in the trial in which the record is introduced.[8]

*See also* Wigmore, *supra* § 1633 (outlining the same essential factors).

The lab reports in this case meet this three-part Framing-era test and are therefore non-testimonial. First, the state lab technicians had a public duty to conduct the test. *See* Mass. Gen. Law. ch. 111, § 12. Second, the reports were created as a result of the required testing. Pet. App. at 24a-29a. And, third, the lab technicians had no special or private interest in Petitioner's case.

That the technicians had no "special interest or motive to misrepresent," the results in Petitioner's case is apparent for at least two reasons. Wigmore, *supra* § 1633(7). First, the technicians had no idea Petitioner was personally involved with the tested substances; his name appeared nowhere on the submitted forms. Pet. App. at 24a-29a. Second, Massachusetts lab technicians can and do submit findings *against* the prosecutorial interest of the Commonwealth in drug-related cases. In *Commonwealth v. Verde*, 827 N.E. 2d 701 (Mass. 2005)—the very decision relied upon by the court below, Pet. App. at 8a—the state laboratory determined that a submitted substance was not illegal, and the defendant used the lab's report at trial to attack the integrity of the Commonwealth's investigation. Pet. App. at 13a-14a.

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[8]Wigmore phrased the private interest rule as a requirement against a "special interest or motive to misrepresent." 5 J. Wigmore. *Evidence* at § 1633(7)(Chadbourn rev. 1974).

### 3. Petitioner's Own Authority Suggests that the Laboratory Reports in this Case Would Have Been Admissible Sixty Years after the Founding.

Petitioner counters that the public records exception rejects "certifications prepared with an eye toward litigation." Pet'rs. Br. at 23. This argument fails because it lacks a "historical pedigree" in the Framing era. *Giles*, 128 S. Ct. at 2687.

After *Giles*, the law is clear: When dealing with the Confrontation Clause, hearsay exceptions are snapshots of the law as it existed "at the time of the Founding." *Id.* at 2682. Petitioner cites no cases or treatises within fifty years of the Framing to support his argument. Nor do any of Petitioner's post-1840 cases hold that a public servant's anticipation of trial required exclusion of his written report.[9] Pet'rs Br. at 23 n.3-4.

Of his cited cases, *People v. Bromwich*, 93 N.E. 933, 387-89 (N.Y. 1911), presents the facts most favorable to Petitioner's argument. In *Bromwich*, the New York Court of Appeals found the Confrontation Clause to be violated in a prosecution for false registration when the trial court admitted several clerks' certifications that the defendant had not been naturalized. Clearly, the clerks had foreknowledge that their certificates were being gathered for use at the defendant's trial. Yet,

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[9]Nor did any of the late-1800's and early-1900's cases cited within *Commonwealth v. Slavski*, 140 N.E. 465, 469 (Mass. 1923), and relied upon by amicus Professor Richard Friedman to forward the same argument, reject a public record due to the public official's foreknowledge of trial. Br. of Amicus Prof. Friedman at 12-13.

*Bromwich* fails to validate an "eye toward trial" exception to the public records doctrine because the court never mentioned the clerks' anticipation of trial as a rationale for its holding.

Whatever substance the *Bromwich* decision provides Petitioner's argument is undone by Petitioner's reliance on *State v. Parker*, 7 La. Ann. 83, 1852 WL 3553 (La. 1852), a case nearly sixty years its senior. Pet'rs Br. at 23 n.3. Like *Bromwich*, *Parker* did not specifically address the issue of whether foreknowledge of trial affected the admissibility of public records.

*Parker* did, however, address the admissibility of contemporary forensic reports (*i.e.* coroner's inquests) and found that they *were* admissible without confrontation. That the coroner's inquest was made with an eye toward trial is beyond question: "[I]t is expressly declared, that the inquest, signed by the coroner and members of the jury, shall be sent to the clerk's office, to be a record of the facts to be used before the grand jury, in case a prosecution takes place." 1852 WL 3553 at *2.

The *Parker* court divided coroner's inquest results into two categories. *Id.* at *1-2. First, the court deemed "mere physical facts . . . [recorded] upon inspection by a public officer and intelligent men" to be admissible without confrontation because the facts were "evidence of neither guilt nor innocence, and have no direct tendency to implicate the accused, nor anyone else." *Id.* at *1. In support of this finding, the court cited Wigmore and McNally for the proposition that inquest results were admissible "matters of public and general concern" (*i.e.* public records) under "[t]he ancient rules of the common

law." *Id.* at *2. Second, the court deemed "that part of the coroner's inquest, which tends to trace the death to a person accused of the deed" to be inadmissible "because it tends to show guilt in him to the exclusion of others; and, therefore, he has the constitutional right of meeting the witnesses face to face." *Id.* at *2. Included in this group of inadmissible documents were the "deposition[s] of the witnesses before the inquest." *Id.*

*Parker*'s significance is two-fold. First, it dispels Petitioner's "eye toward litigation" argument. *Parker* demonstrates that, as many as sixty years after the Framing, public records generated with an eye toward trial could be admitted, without confrontation, in criminal prosecutions. *Id.* at *1-2.

Second, *Parker* sheds light on how modern-day forensic lab reports would have been treated "at the time of the Founding" and shortly thereafter. *Giles*, 128 S. Ct. at 2682. American courts had "flatly rejected" the use of witness *depositions* taken during a coroner's inquest by at least the 1840's. *Crawford*, 541 U.S. at 47 n.2. *Parker* reflects that decision. *Id.* at *2. That the *Parker* court admitted the *forensic findings* of a coroner's inquest in 1852 suggests that a coroner's forensic report was still treated as a common law public record years after the Framing, as long as coroner's factual findings had "no direct tendency to implicate the accused, nor anyone else." *Parker*, 1852 WL 3553 at *1.

Whether *Parker* reflects a special rule for coroner's inquests or a post-Framing addition to the public records exception (*i.e.* that the facts within the public record "have no direct tendency to implicate the accused") is unclear. *Id.* But, for present

purposes, further clarity on that issue is unnecessary because the lab reports in this case fit within the common law's framework and *Parker's* framework. Just as the coroner's factual findings in *Parker* (*i.e.* that the deceased was killed by a pistol shot) did not "implicate the accused, nor anyone else," the factual findings contained in the present lab reports (*i.e.* the weight and composition of the seized cocaine) did not directly implicate Petitioner for possessing or trafficking cocaine. *Id.*

In short, *Parker* supports a Framing-era distinction between *ex parte* depositions or affidavits taken from a witness and the *ex parte* forensic findings of a public servant: The former were subject to the Confrontation Clause; the latter were not. The lab reports in this case are the "functional equivalent" of a coroner's forensic findings, much more so than a witness's "*ex parte* affidavit" as Petitioner contends. Pet'rs. Br. at 4, 11, 16. Accordingly, *Parker* suggests that the present lab reports would have been considered non-testimonial public records "at the time of the Founding" and at least 60 years beyond. *Giles*, 128 S. Ct. at 2682.

### B. The Laboratory Reports in this Case Are Fundamentally Different from the *Ex parte* Depositions and Affidavits Targeted by the Confrontation Clause.

Even if the present laboratory reports do not fit within the Framing-era public records exception, the statements contained within the reports are not testimonial for either of two reasons.

#### 1. The Laboratory Reports Were Not the Products of an *Ex parte* Examination.

The Court has yet to define the term "testimonial statement." But four factors suggest that, to be deemed "testimonial" for Sixth Amendment purposes, a statement must have been given under circumstances resembling an *ex parte* examination conducted under the Marian bail and committal statutes.

First, the "use of *ex parte* examinations as evidence against the accused" was the "principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50. And for good reason: "The Marian system imparted a strong prosecutorial bias" in magistrates, making them "a partisan rather than a truth seeker." John H. Langbein, *The Origins of Criminal Advocacy*, 43 (2003). Justices of the peace took statements at committal hearings with a "prosecutorial cast by recording either the full story 'or as much thereof as shall be material to prove the felony.'" John H. Langbein, *Prosecuting Crime in the Renaissance*, 18 (1974)(quoting 2 & 3 Phillip & Mary c. 10 (1555)). Justices of the peace also "policed the land" outside their courtrooms, rounding up additional witnesses and recording their accusatory statements. *Id.* at 6; *see also* John H. Langbein, *Shaping the 18th-Century Criminal Trial: A View From the Ryder Sources*, 50 U. Chi. L. Rev. 1, 60-76 (1983)(describing the examination and policing system created by the Fielding Brothers, who served as justices of the peace in London in the mid-1700's). Most importantly, these inquisitorial practices were vilified because they created admissible evidence in statutory-derogation of the common law. *Crawford*, 541 U.S. at 42-50. That the use of *ex parte* examinations as evidence ended during the Framing era, while the admission of other hearsay statements

such as public and business records persisted, indicates that the Confrontation Clause was directed at statements taken under the Marian procedure.

Second, the Court's body of Confrontation Clause precedent reflects this targeting of Marian-style examinations. As outlined *supra* at pages 4-5, each of the statements the Court has treated as "testimonial" to date was generated during court proceedings or out-of-court interrogations. In other words, each "testimonial" statement was given under circumstances resembling a Marian examination.

Third, resemblance to a Marian-style *ex parte* examination was the deciding factor in *Crawford*, *Davis*, and *Hammon* (*Davis*'s companion case). In all three cases, the declarant was a victim or eyewitness whose statement contained detailed accounts of the crime. *See Crawford*, 541 U.S. at 38-40; *Davis*, 547 U.S. at 817-21. In all three cases, the statement was used to convict the defendant. *See id.* Yet, the Court reached different conclusions on the "testimonial" question. In *Crawford* and *Hammon*, the Court held that the declarants' responses to police interrogation were testimonial because modern-day police interrogations bear a "striking resemblance" to the *ex parte* examinations conducted under the Marian statutes. *See Crawford*, 541 U.S. at 52; *Davis*, 547 U.S. at 830. In *Davis*, the Court held that a telephone call to a 911 operator was not testimonial because the "primary purpose" of the call was to cry for help. *Id.* at 823-29. In other words, giving a statement to an interrogating police officer resembled "testifying" before a Marian magistrate; conveying an emergency to a 911 operator did not.

Finally, the quartet of testimonial settings listed by the Court in *Crawford*—*i.e.* preliminary hearings, proceedings before a grand jury, former trials, and police interrogations—share a common thread: Each bears a "striking resemblance" to the circumstances in which magistrates took *ex parte* statements under the Marian statutes. *Crawford*, 541 U.S. at 68.

The recording of lab results, on the other hand, bears no resemblance to an *ex parte* examination. There is no "prosecutorial bias" in the examiner because there is no examiner. Langbein, *The Origins of Criminal Advocacy*, 43. Nor is there a "careless scribe [to] make a witness speak what he never meant," 3 William Blackstone, *Commentaries on the Law of England*, 373 (1786), because there are no "inquisitorial practices" to transcribe. *Crawford*, 541 U.S. at 51. There is no judge, jury, or police officer. There is only a machine and a technician generating data through a mechanized process that produces "nearly infallible" results. *Taylor v. O'Grady*, 888 F.2d 1189, 1192 n.4 (7th Cir. 1989)("[s]urveys have rated the [gas chromatographer/mass spectrometer] as 'nearly infallible'").

Because the production of lab results bear no resemblance to a Marian-style *ex parte* examination, the lab reports in this case fall outside the Confrontation Clause's "core [and] its perimeter." *Davis*, 547 U.S. at 824.

**2. The Statements Within the Laboratory Reports Were Not Made by a "Witness Against" the Petitioner.**

The "primary object" of the Confrontation Clause was to terminate the admissibility of *ex parte* examinations and thereby provide a defendant with

the opportunity, "not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). When applied to human witnesses who must recall "potentially criminal past events," this objective works well. *Davis*, 547 U.S. at 830.

But that is not the case here. At least, we cannot be sure. By waiting until the last moment to object to Massachusetts's introduction of the lab reports (J.A. 29, 32), Petitioner silenced the record on who made the statements in question, and under what circumstances. The States address both possibilities: man and machine.

One fact is certain: The statements contained in the lab reports—*i.e.* "The Substance was found to contain Cocaine," Pet. at 24a, 26a, 28a, "Net Weight: 2.41 grams," Pet. at 24a, "Net Weight: 2.34 grams," Pet. at 26a, and "Net Weight: 22.16 grams," Pet. at 28a—are not human recollections of a past criminal event. Perhaps most appropriately, they should be deemed the "purely mechanical" findings of a gas chromatographer/mass spectrometer ("GC/MS"). Mass. Br. at 7-8, 32; *State v. Christian*, 895 P.2d 676, 683 (N.M. 1995). When testing a substance in a gas chromatographer, once a technician shoots a sample into the machine, the machine does the rest. *Christian*, 895 P.2d at 683 ("[O]nce the sample was prepared and put on, into the gas chromatograph for analysis, the entire testing procedure is done electronically or mechanically."). Essentially, the

machine is the declarant, and the technician is the reporter who transcribes its data.

"[T]he witnesses with whom the Confrontation Clause is concerned are *human witnesses*." *United States v. Lamons*, 532 F.3d 1251, 1263 (11th Cir. 2008). While it may work on humans, placing a machine into the "crucible of cross examination" will not satisfy any of the Confrontation Clause's objectives. *Crawford*, 541 U.S. at 26. A machine has no "conscience" to "sift," and its "demeanor on the stand" will invariably match its demeanor in the lab. *Mattox*, 156 U.S. at 242. A machine's statement will never waiver. Stated simply, cross-examining a machine is utterly pointless. The Court should reject an extension of the Confrontation Clause to require confrontation of machine-generated data. *See United States v. Washington*, 498 F.3d 225 (4th Cir. 2007)(holding that "raw data generated by the machines were not hearsay statements as implicated by the Confrontation Clause").

While the GC/MS procedure is "purely mechanical," *Christian*, 895 P.2d at 683, the States acknowledge that human technicians likely interpreted the machine's raw data in some fashion. But even if the record in this case established that technicians channeled raw data into a final conclusion, the technicians were not acting as "witnesses against" Petitioner in the Constitutional sense. U.S. Const. amend. VI. When the technicians created the lab report in Petitioner's case, they were not "testifying," they are *working*—on one of a thousand faceless samples. Unlike the examination of victims, accomplices, and other witnesses with personal knowledge of the crime, cross-examining technicians about a particular defendant's case—like

cross-examining any public servant who creates unmemorable public records—would provide little, if any, insight into the composition of the drugs in question beyond what is contained in the report. At best, the defendant would receive an "incidental benefit," that fails to outweigh the "considerations of public policy" that spawned the States' certificate of analysis statutes. *Mattox*, 156 U.S. at 243.

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On a final note, Petitioner's fears that determining lab reports are non-testimonial will open the floodgates to "trials-by-affidavit" are unfounded. Pet'rs. Br. at 15, 33. The admissibility of lab reports is still governed by modern hearsay law.

Their admissibility is in good hands. As outlined *infra* at pages 28-33, every state that has a statutory hearsay exception for lab reports also provides the defendant with an opportunity to cross-examine the technician. The states using qualified surrogate witnesses to interpret the original test data provide a similar opportunity. Placing the admissibility of lab reports within the flexibility of state hearsay laws in these ways serves both the interest of the defendant (*i.e.* summoning a technician when his presence is desired) and the interest of the public (*i.e.* leaving the technician in the lab when it is not).

## II. THE COURT SHOULD REJECT PETITIONER'S ABSOLUTIST APPROACH TO THE CONFRONTATION CLAUSE.

If the Court determines that the lab reports were "testimonial," Massachusetts requests the Court either (1) affirm because Petitioner voluntarily disregarded the "opportunity to cross examine"

provided by Massachusetts law or (2) remand this case for a harmless error determination. Mass. Br. at 54-59, 66-68. The States agree with both requests, but focus the remainder of their brief on the former due to its impact on the States.

Massachusetts law provided Petitioner with the opportunities to (1) cross-examine the technicians at a pre-trial admissibility hearing and (2) compel their presence at trial. *See* Mass. Br. at 55-59. Petitioner chose neither, and the parties differ on the effect of Petitioner's choice.

Massachusetts argues that Petitioner's failure to avail himself of the state-law "opportunity to cross-examine" precludes a finding that the Confrontation Clause was violated. Mass. Br. at 55-59. We agree. And, under certain circumstances, so do Petitioner's amici law professors. Br. of Amici Law Profs. at 15.

Petitioner takes a more hard-line approach. When faced with this question at the cert-stage, Petitioner argued that his opportunity to cross-examine the technicians "in a pre-trial *Daubert*-type hearing [was] beside the point." Pet'rs Cert. Reply Br. at 4. According to Petitioner, once he raised a *Crawford* objection during the middle of trial (J.A. 29, 32), "the Confrontation Clause command[ed] that reliability be assessed in a particular manner: by testing in the crucible of cross-examination before the jury." Pet'rs Cert. Reply Br. at 4. In other words, to ensure the admissibility of laboratory analyses, Petitioner would require the States to keep the testing analyst at their beck and call, in the courtroom, at trial—just in case the defendant raises a last-second *Crawford* objection. The opportunities provided by state law to cross-examine a technician

at an earlier proceeding, or to compel his presence at trial, are irrelevant.

Again, Petitioner's amici law professors reject Petitioner's "absolutist approach" (Mass. Br. at 59) and instead focus their brief on minimizing the effects of reversal here. Br. of Amici Law Profs. at 5-26. In addressing the professors' primary arguments (*i.e.* the use of stipulations, notice-and-demand statutes, surrogate witnesses, and the percentage of pleaded felonies), the States show that Petitioner's interpretation of the Confrontation Clause is not only wrong, it would be practically devastating to the States if adopted by the Court.

### A. Adoption of Petitioner's Absolutist Approach Would Require the States to Produce a Technician at Every Drug-Related Trial.

First, the States dispel the amici professors' belief that the use of stipulations when lab results are "compatible with the defendant's theory of the case" would minimize the effects of a reversal here. Br. of Amici Law Profs. at 12. As proved by the facts and consequences of this case, the professors' faith in conciliatory defense tactics to alleviate the States' burden is misguided.

Petitioner's theory of the case was that he could not be connected to the cocaine seized by police. J.A. 11, 43-48. Consistent with that theory, Petitioner admitted in his opening statement and his closing argument that the substances were drugs. J.A. 11, 45-47 . But Petitioner stipulated to nothing. J.A. 7-8. Having nothing to lose, he instead used *Crawford* as a last-second, pocket-veto against the State's

introduction of the lab reports. J.A. 29. And here we are.

If Petitioner is correct that the introduction of a lab report without technician testimony warrants reversal—despite the defendant's failure to seek (or even want) the technician's presence at trial—he will have sketched the blue-print for all future defendants: Stipulate to nothing and force the State's hand. At worst, the State produces the technician, and the defendant stipulates to his findings or offers to plead guilty moments before the technician takes the stand. At best, the State cannot secure the technician's presence, and the defendant successfully prevents any evidence of the analysis. Either way, the defendant has no incentive to stipulate to the analysis results until the technician walks through the courthouse doors, *after* the State has expended time and money getting him there. With regard to protecting the public's resources, stipulations are rather meaningless at that point.

This is not a game in which the States can play. In the CSI-era, we have no realistic choice but to introduce scientific evidence of a substance's weight and composition, whether by lab report or live testimony. Jurors expect nothing less. *See* Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 Yale L.J. Pocket Part 70 (2006)(outlining a survey in which "38% [of prosecutors] believed they had at least one trial that resulted in either an acquittal or hung jury because forensic evidence was not available").[10] Defendants know this, and if Petitioner prevails here, it is knowledge they will use

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[10]Available at http://www.thepocketpart.org/2006/02/thomas.html.

against the States, with the by-product being an unnecessary drain on public funds. To believe that Defendants will freely toss aside this trump card to convenience the State is out-of-touch with the realities of an adversarial system.

### B. Adoption of Petitioner's Absolutist Approach Would Cause Systemic Gridlock in State Courts and Laboratories.

In 2006, state and federal law enforcement agents arrested 1,889,810 persons in the war on drugs. *See* Uniform Crime Report, *supra*, at Table 29. That same year, 1,935,788 drug items were analyzed by state and local forensic laboratories. *See* NFLIS, *supra*, at 6-7. Stating the obvious, it was the States' duty to pay for these tests and the resulting prosecutions.

The amici professors try to minimize the impact of these numbers by citing an FBI statistic that only 5% of felony convictions result from actual trials. Brief of Amici Law Profs. at 7-8. We agree that a large majority of drug cases end without trial. Clearly they do. But the professors miss the big picture: Even if only 5% of drug cases culminate in trial, as long as the number of yearly drug arrests and analysis abides in the millions, the burden on the States is oppressive.

The only way for the Court to truly appreciate the effect of Petitioner's interpretation of the Confrontation Clause, which would require the States to produce a technician at every drug-related

trial, is to first recognize the burden we currently face *without* such a requirement.[11]

- *New Mexico*: In 2006, 5,775 persons were arrested in New Mexico for drug abuse violations. *See* Office of National Drug Control Policy, *State of New Mexico, Profile of Drug Indicators* (April 2008). One state laboratory, the Scientific Laboratory Division "SLD," handled the resulting caseload. *See* Court Statistics Project, *State Court Caseload Statistics, 2006*, 46 (National Center for State Courts 2007). The SLD employs ten technicians (App. 4a) to perform the laboratory's drug analyses and appear before New Mexico's eighty-four district judges and sixty-five magistrate judges. *Id.* In 2007, the SLD's ten technicians spent 3,782 hours answering discovery orders and subpoenas, preparing for court, and traveling to present live testimony. App. 4a. In other words, "the time lost to prosecution-related activities in 2007 was equivalent to losing 4.5 [of the 10] employees from the laboratory." App. 4a. And matters are worsening. Through June of 2008, the number of discovery orders and subpoenas received by the SLD increased 40% and 30% respectively in comparison to the same time period in 2007. App. 5a.

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[11]While they are public information, statistics regarding the current number of court hours worked by state laboratory technicians are not generally published in a citable format. Accordingly, to assist the Court, the States have followed Petitioner's lead, Pet'rs. Br. at 1a-2a, by gathering and presenting these statistics as answers to information requests. *See infra* pp. 4a-10a.

- *Alabama*: In 2006, 18,930 persons were arrested for drug violations in Alabama. *See* Alabama Criminal Justice Information Center, *Crime in Alabama, 2007*, 11 (2007). The next year, the thirty-six scientists of Alabama's Department of Forensic Sciences Drug Chemistry unit analyzed approximately 60,538 items in 30,053 cases, and they made 186 court appearances at the cost of 654 laboratory hours. App. 6a. The disparity between the arrests made in 2006 (18,930) and the number of cases worked in 2007 (30,053) is not an anomaly. It's the result of a testing backlog that, as far back as 2003, constituted fourteen months in drug cases. *See State v. Johnson*, 900 So. 2d 482 (Ala. Crim. App. 2004)(reversing dismissal on speedy-trial grounds because "the delay in this case was caused by a [14-month] delay in testing by the Alabama Department of Forensic Sciences"); *see also Department of Justice Oversight: Funding Forensics Sciences – DNA and Beyond: Testimony Before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts*, 108th Cong. (2003)(testimony of Randall Hillman)(testifying that the Alabama Department of Forensic Sciences had a backlog of "almost 12,000 drug analysis cases").

- *Alaska*: If the Court adopted Petitioner's interpretation of the Confrontation Clause, Alaska would likely be hardest hit. Covering 663,267 square miles (most of which are mountainous, frozen, or both), Alaska is the nation's largest state. *See* The World Almanac

and Book of Facts 2008, 555. One crime lab, the Alaska Scientific Crime Detection Laboratory "SCDL," handles all testing of illegal substances, and it serves fifty-seven courts across the state. App. 8a-9a. In fiscal year 2008, twenty-two technicians performed 3,380 tests. App. 8a. That same year, these technicians appeared in approximately 157 courtrooms, costing the SCDL "102 *days* of productive lab time." App. 9a (emphasis added). The reason is simple: Due to Alaska's geography and weather, the SCDL "spends an average of 42 hours of travel/wait time for every five hours of testimony." App. 10a. In other words, "one hour of court testimony [costs] 8.4 hours in productive lab time." *Id.*

The professors do cite one extremely relevant piece of "[a]necdotal evidence:" Lab technicians are only called to testify in approximately eight to ten percent of cases in which they are subpoenaed. Br. of Amici Law Profs. at 8. If lab technicians only appear in 10% of drug-related trials currently, and Petitioner is right that the Confrontation Clause requires the State to produce them in 100% of cases with positive results (to protect against the off-chance that the defendant *might* raise a last-second *Crawford* objection), the effects on the States would be devastating. While a ten-fold increase in technician's trial appearances may not occur, the statistics above establish that even a conservative four or five-fold increase would cause systemic gridlock throughout State courts and laboratories.

### C. Adoption of Petitioner's Absolutist Approach Is Unnecessary Because the States Are Protecting a Criminal

**Defendant's "Opportunity to Cross-Examine."**

While we may quibble over the details, the States agree with the professors that "notice-and-demand statutes" (Br. of Amici Law Profs. at 13-15) and the use of "surrogate experts" (*id.* at 20-26) can constitutionally satisfy a defendant's opportunity to cross-examine a technician.[12] *See Douglas v. Alabama*, 380 U.S. 415, 418 (1965)("an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation"); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966)(the right to confrontation may be waived if knowing and voluntary).

Below, the States offer a glimpse at the myriad of statutes and practices we have devised to balance our interest in avoiding the wasteful production of unwanted witnesses with the defendant's interest in cross-examining a laboratory technician. No matter the regime chosen by the State, the defendant maintains the "opportunity to cross-examine."

1. *Notice-and-Demand*: As the name implies, a notice and demand statute (1) requires the State to give notice of its intent to introduce a certificate of analysis *in lieu* of live testimony and (2) requires the defendant to subsequently demand the technician's presence.

- *Ohio*: Ohio requires a prosecutor to serve a copy of the certificate on the defendant before trial with an explanation of the defendant's right to demand confrontation

[12]The States do not agree with the restrictions the professors place on these practices. Br. of Amici Law Profs. at 15, 23.

and the manner in which to make that demand. *See* Ohio Rev. Code Ann. § 2925.51(B), (D) (West 2008). The State must produce the technician who signed the certificate if the defendant demands his presence within seven days of receiving notice. *Id.* at § 2925.51(C).[13]

- *Texas*: Texas requires the State to file a copy of the certificate to be introduced with the clerk of the court and to deliver a copy to the defendant at least twenty days in advance of trial. *See* Tex. Code Crim. Proc. Ann art. 38.41 (Vernon 2003). The certificate is not admissible if the defendant demands the technician's presence in the same manner at least ten days before trial. *See id.*

2. *Anticipatory Demand*: 'Anticipatory demand' statutes do not require notice by the State. While these statutes may sound less protective than 'notice and demand' statutes at first blush, it must be remembered that, in drug cases, the certificate of analysis will invariably be included within pre-trial discovery, thereby providing notice.

- *Colorado*: Colorado allows admission of a certificate of analysis *in lieu* of live testimony unless a defendant demands presence "at least ten days before the date

---

[13]The Ohio Court of Appeals has held that a defendant's failure to demand the technician's presence after receiving proper notice could waive the defendant's right to confront. *State v. Smith*, No.1-05-39, 2006 WL 846342, at *5-8 (Ohio Ct. App. Apr. 3, 2006)(reversing because the State's notice was not proper).

of such criminal trial." *See* Colo. Rev. Stat. Ann. § 16-3-309 (West 2008).[14]

- *Oregon:* Oregon requires a defendant to file written notice with the court and the district attorney of his intent to object to a report's findings "not less than 15 days prior to trial." Or. Rev. Stat. § 475.235(5).[15]

3. *Defense Subpoenas:* Like notice-and-demand statutes, these statutes require the State to notify the Defendant of its intent to offer a lab report *in lieu* of live testimony. The difference is that the defendant must subpoena the technician to secure his presence for trial, instead of filing a demand with the court.

- *Rhode Island:* At least ten days before trial, Rhode Island prosecutors must notify the defendant of their intent to introduce a lab report. *See* R.I. Gen. Law § 9-19-43 (2007). Section 9-19-43 provides that "nothing . . . shall be construed to limit" (1) the defendant's right to "summon" the technician for cross-examination, (2) the defendant's right to "summon any other

---

[14]The Supreme Court of Colorado has held that a defendant can waive his confrontation right by failing to avail himself of the statutory demand procedure. *Hinojos-Mendoza v. People*, 169 P.3d 662, 667-70 (Colo. 2007), *petition for cert. filed* __ U.S.L.W. __ (U.S. Feb. 4, 2008).

[15]The Oregon Court of Criminal Appeals has held that a defendant may waive his right to confront by failing to follow Oregon's statutory demand procedure. *State v. Miller*, 144 P.3d 1052, 1060-61 (Or. Ct. App. 2006)(reversing due to "prosecutorial error" in failing to secure witnesses' presence after giving assurance that he would) *adh'd to on recons.* 149 P.3d 1251 (Or. Ct. App. 2006).

person" to testify regarding the test results, or (3) the trial court's ability to require the technician's presence at trial. *Id.*

4. *Automatic Admission*: These statutes allow lab reports to be introduced without prior notice. As shown in this case, however, the defendant is provided a copy of the certificate during discovery, and he has the same general opportunities to confront the technician provided by other statutes.

- *Massachusetts*: Like Petitioner, defendants are given a copy of the lab report before trial. J.A. 5. The defendant may subpoena the technician, *see* Mass. R. Crim. P. 17, and seek discovery concerning the methods and qualifications of the technician. *See* Mass. R. Crim. P. 14. The defendant may also request a pre-trial evidentiary hearing to challenge the validity of the scientific techniques. *See Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1349 (Mass. 1994). And as proved in *Verde*, a defendant may hire his own expert to inspect the state lab and conduct his own test of the substance in question. Pet. App. at 14a-15a.

5. *Surrogate Witnesses*: Finally, many states—including the states that do not presently have admissibility statutes—produce a qualified laboratory employee, *in lieu* of the testing analyst, to explain the drug analysis procedure and to offer an opinion based on the original test data. *See State v. Geier*, 161 P.3d 104 (Cal. 2007)(holding that a defendant's Sixth Amendment right was not violated when a laboratory supervisor testified *in lieu* of the

testing analyst). This practice is vital to the States because it takes into account that, in many cases, (1) an analyst may become truly unavailable due to death or change of employment or (2) a team of analysts was involved in the handling and testing process, and it would be unduly burdensome to produce the entire team to present cumulative testimony.

* * *

To be clear, the States are not advocating a particular type of statute or practice. We leave that task to our legislatures. The States merely request the Court reject Petitioner's contention that these statutes and procedures categorically fail to satisfy the "opportunity to cross-examine" guaranteed by the Sixth Amendment.

## CONCLUSION

The Court should affirm the decision of the Massachusetts Court of Appeals that the laboratory reports in this case were non-testimonial.

Respectfully submitted,

Troy King
*Attorney General*

Corey L. Maze
*Solicitor General*
Counsel of Record

Margaret L. Fleming
*Assistant Attorney General*

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130
(334) 242-7401

September 9, 2008

# APPENDIX

## APPENDIX A

State Forensic Analysis Admissibility Statutes[1]

| State | Statute |
|---|---|
| Alabama | Ala. Code §§ 12-21-300, -301, -302 |
| Alaska | Alaska Stat. § 12.45.084 |
| Arizona | Ariz. Rev. Stat. § 36-254 |
| Arkansas | Ark. Code Ann. § 5-64-707<br>Ark. Code Ann. § 12-12-313 |
| Colorado | Colo. Rev. Stat. § 16-3-309 |
| Connecticut | Conn. Gen. Stat. Ann. § 21a-283 |
| Delaware | Del. Code Ann. tit. 21 § 4177(h)<br>Del. Code Ann. tit. 10 § 4330 |
| District of Columbia | D.C. Code Ann § 48-905.06 |
| Florida | Fla. Stat. Ann. § 316.1934<br>Fla. Stat. Ann. § 327.354 |
| Idaho | Idaho Code § 37-2745 |
| Iowa | Iowa Code § 691.2 |
| Kansas | Kan. Stat. Ann. § 22-2902a<br>Kan. Stat. Ann. § 22-3437 |
| Kentucky | Ky. Rev. Stat. § 189A.010 |
| Louisiana | La. Rev. Stat. Ann. § 15:500<br>La. Rev. Stat. Ann. § 15:501<br>La. Rev. Stat. Ann. § 32:662<br>La. Rev. Stat. Ann. § 32:663 |

[1]Includes drug and blood-alcohol analyses.

| State | Statute |
|---|---|
| Maine | Me. Rev. Stat. Ann. tit. 17-A, § 1112<br>Me. Rev. Stat. Ann. tit. 29-A, § 2431 |
| Maryland | Md. Code Ann., Cts. & Jud. Prod § 10-1001, -1002, -1003 |
| Massachusetts | Mass. Gen. Laws ch. 111 § 13<br>Mass. Gen. Laws ch. 22C §§ 39,41<br>Mass. Gen. Laws ch. 90B § 8 |
| Michigan | Mich. Comp. Laws § 257.625a |
| Minnesota | Minn. Stat. §§ 634.15, -.16 |
| Missouri | Mo. Rev. Stat. § 577.022<br>Mo. Rev. Stat. § 577.037 |
| Montana | Mont. R. Evid. 803(6), (8) |
| Nebraska | Neb. Rev. Stat. § 28-1439 |
| Nevada | Nev. Rev. Stat. §§ 50.315, 50.320 |
| New Hampshire | N.H. Rev. Stat. Ann. § 265-A:12<br>N.H. Rev. Stat. Ann. § 318-B:26-a |
| New Jersey | N.J. Stat. Ann. § 2C:35-19 |
| New Mexico | N.M. Stat. Ann. § 66-8-110<br>N.M. Stat. Ann. § 66-13-11 |
| New York | N.Y. Veh. & Traf. Law § 1195<br>N.Y. C.P.L.R. 4518, 4520 |
| North Carolina | N.C. Gen. Stat. § 20-139.1,<br>N.C. Gen. Stat. § 90-95(g) |

| State | Statute |
|---|---|
| North Dakota | N.D. Cent. Code § 19-03.1-37<br>N.D. Cent. Code § 39-20-07 |
| Ohio | Ohio Rev. Code Ann. § 2925.51 |
| Oklahoma | Okla. Stat. Ann. tit. 22 § 751<br>Okla. Stat. Ann. tit. 22 § 751.1 |
| Oregon | Or. Rev. Stat. § 475.235 |
| Pennsylvania | 75 Pa. Cons. Stat. Ann. § 1547 |
| Rhode Island | R.I. Gen. Laws § 9-19-43 |
| South Carolina | S.C. R. Crim. P. 6 |
| South Dakota | S.D. Codified Laws § 1-49-6 |
| Tennessee | Tenn. Code Ann. § 55-10-407 |
| Texas | Tex. Crim. Proc. art. 38.41 |
| Utah | Utah Code Ann. § 41-6a-515<br>Utah Code Ann. § 72-10-503 |
| Vermont | Vt. Stat. Ann. tit. 23 § 1202,<br>Vt. Stat. Ann. tit. 23 § 1203 |
| Virginia | Va. Code Ann. § 18.2-268.7<br>Va. Code Ann. §18.2-268.9<br>Va. Code Ann. § 19.2-187<br>Va. Code Ann. § 19.2-187.01<br>Va. Code Ann. § 19.2-187.02<br>Va. Code Ann. § 19.2-187.2 |
| Washington | Wash. St. Sup. Ct. Crim. R. 6.13<br>Wash. Rev. Code § 46.20.308 |
| West Virginia | W. Va. Code § 17C-5A-1 |
| Wyoming | Wyo. Stat. Ann. § 31-6-105 |

## APPENDIX B

[*Letterhead: New Mexico Department of Health*]

Office of the Attorney General
11 South Union Street
Montgomery, AL 36130

August 5, 2008

Re: Request for SLD Statistics

Dear Attorney General King:

I write in response to your request for information concerning the Toxicology Bureau of the Scientific Laboratory Division ("SLD") of the New Mexico Department of Health. The SLD is the central laboratory that performs state-wide drug testing in support of the New Mexico Implied Consent Act, and has 10 laboratory technicians who perform drug analysis testing. The following spreadsheet shows the amount of time lost from analytical work by the Toxicology Bureau staff at SLD in 2007 due to the prosecution of drug cases across the state:

Prosecution Burden on Toxicology Operation at SLD

| | Hours/year |
|---|---|
| Discovery Orders | 332 |
| Subpoenas | 1057 |
| Court and Travel | 1313 |
| Prep Time for Court | 540 |
| Pre-Trial Conferences | 540 |
| **Total** | **3782** |

The time lost to prosecution-related activities in 2007 was equivalent to losing 4.5 employees from the laboratory, based upon an estimate of 833 hours of

productive analytical time per employee per year. These statistics were compiled by SLD employees from SLD records for the year 2007. In the first six months of 2008, the numbers of discovery orders and subpoenas received by SLD increased 40% and 30%, respectively, vs. the same time period in 2007.

If you would like more information about the SLD, please visit our website at: www.newmexico.gov under the heading for the Department of Health.

Sincerely,

<s>

David E. Mills, PhD HCLD
Director
Scientific Laboratory Division

[FOOTER: DAVID MILLS'S CONTACT INFORMATION]

## APPENDIX C

[*Letterhead: AL Department of Forensic Sciences*]

August 18, 2008

Corey L. Maze
Asst. Attorney General
11 South Union Street/Suite 310
Montgomery, Alabama 36130-0152

Dear Mr. Maze:

Per your request, this letter contains 2007 data concerning the Alabama Department of Forensic Sciences Drug Chemistry division. In summary, the data reports 30,053 individual cases completed. Chemists appeared in court 186 times totaling 654 hours out of the laboratory.

2007 calendar year

| | | |
|---|---|---|
| # cases worked | | 30,053 |
| Approximate # of items analyzed | | 60,538 |
| # of reporting scientists at end of 2007 | | 36 |
| # appearances in State court | | 171 |
| | hours out of lab | 582 |
| # appearances in Federal court | | 15 |
| | hours out of lab | 72 |
| Totals | 186 Appearances | 654 Hours |

If you need further information, please do not hesitate to contact me.

Sincerely,

<s>
Michael F. Sparks
Director

## APPENDIX D

[*Letterhead: State of Alaska Department of Public Safety: Scientific Crime Detection Laboratory*]

August 8, 2008

Office of the Alabama Attorney General
11 South Union Street
Montgomery, AL 36130

Dear Sir,

In response to your request for information concerning the Alaska Scientific Crime Detection Laboratory (henceforth AK SCDL or Crime Lab) lab personal worked collectively to provide the following information for FY08[1]:

1. Number of requests for analysis: 4633
2. Number of analyses conducted: 3380
3. Number of technicians/analysts who conducted tests: 22
4. Number of state crime labs: 1
5. Number of state courts or locations traveled to: 57
6. Current backlog:

| | |
|---|---|
| Latents | 205 |
| DNA | 450 |
| Crime Scene | 65 |
| Bio Screening | 130 |

[1] The numerical figures given in items 1-3 were obtained through the AK SCDL LIMS Database. Current backlog numbers provided in item 6 were provided by the AK SCDL Manager, Orin Dym.

| | |
|---|---|
| FA/TM | 128 |
| Blood Alcohol | 61 |
| Total | 1,039 |

7. There is only one state crime laboratory serving the entire state of Alaska. The Anchorage Police Department (APD) has one crime lab serving the Municipality of Anchorage. APD's lab conducts fingerprint analysis. The AK SCDL does some fingerprint and all other testing for APD.

The Department of Public Safety AK SCDL serves at minimum 43 Trooper Posts under 5 Detachments, 15 offices under ABADE (alcohol & drug enforcement) and ABI (AK Bureau of Investigations)[2] and 50 police departments[3], covering 586,412 square miles. The AK SCDL receives requests for lab services from 3 local Federal Bureau of Investigation Alaska Field Offices, the U.S. Bureau of Alcohol, Tobacco and Firearms, and the Drug Enforcement Agency, providing assistance to the Federal Government primarily in drug, bootlegging, and firearms cases. Additionally, the AK SCDL occasionally provides analysis for the Alaska Wildlife Troopers.

The Crime Lab serves 57 courts, 4 Districts, and 13 District Attorney Offices in the state of Alaska.[4] At the time of this writing the Crime Lab has approximately 647 active subpoenas amongst 26

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[2] http://www.dps.state.ak.us/

[3] http://www.dps.state.ak.us/Ast/domesticviolence/policedepts.aspx

[4] http://www.state.ak.us/courts/courtdir.htm

analysts and technicians.[5] In FY08, 23 analysts/technicians testified in court throughout Alaska[6]. Their testimony consisted of approximately 157 court appearances consuming 102 days of productive lab time (7.5 hours=one day).[7] In FY07 the numbers were significantly higher. Excluding all appearances within driving distance of the lab (the Anchorage Municipality, Matanuska-Susitna Municipality, and the Anchorage Federal court system consisting of 4 courts) there were 99 court appearances involving flight travel throughout Alaska consuming 152 days of productive lab time.[8]

A snapshot of our Crime Scene, Latents, Shoe and Tire Section shows that section spends an average of 42 hours of travel/wait time for every 5 hours of testimony. This translates into one hour of court testimony costing 8.4 hours in productive lab time.[9]

With the exception of identified database report extractions from the AK SCDL LIMS database and internet websites clearly noted, the information provided for this response was compiled through the combined efforts of the AK SCDL's Forensic Laboratory Manager, Quality Assurance Manager, Paralegal, Supervisors, Analysts and Technicians. This included compiling individually documented

---

[5] Hand counted from current individual analyst/technician subpoena files.

[6] Data retrieved from the LIMS database, AK SCDL court calendar records and Travel Authorization (TA) files.

[7] Each Section Supervisor compiled local court attendance information for their Section and that information was combined with information compiled after hand counting all TAs for court travel completed by lab analysts/technicians.

[8] TAs for FY07—court travel completed only.

[9] Section Supervisor Lesley Hammer.

local court appearances, wait times and actual testimony times; a review of all completed Travel Authorizations for the included Fiscal Years (2007 and 2008); previously compiled backlog data; and a hand count of current subpoena files for each analyst and technician.

All data not extracted from the database or obtained through governmental websites should be considered approximations. Those approximated numbers are provided to the best of the Crime Lab's collective knowledge and should be considered under inclusive.

If you have any questions, or require additional information, please feel free to contact us directly.

Respectfully submitted,

<s>

Antoinette Otten
Legal Section
907 269-3983

# AMICUS CURIAE BRIEF

95

(10)

No. 07-591

Supreme Court, U.S.
FILED
JUN 2 3 2008
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,

*Petitioner,*

v.

MASSACHUSETTS,

*Respondent.*

**On Writ Of Certiorari To The Appeals Court Of Massachusetts**

## BRIEF OF RICHARD D. FRIEDMAN, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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125880 A 27p

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus* is a legal academic holding the title of Ralph W. Aigler Professor of Law at the University of Michigan Law School. Since 1982 he has taught Evidence law. He is general editor of THE NEW WIGMORE: A TREATISE ON EVIDENCE, and author of THE ELEMENTS OF EVIDENCE (3d ed. 2004).

Much of the academic work of *amicus* has dealt with the right of an accused under the Sixth Amendment "to be confronted with the witnesses against him." He has written many articles and essays on that right, and since 2004 he has maintained The Confrontation Blog, www.confrontationright.blogspot.com, to report and comment on developments related to it. In 2005-06, *amicus* successfully represented the petitioner in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 126 S.Ct. 2266 (2006)).

In the present case, as in *Giles v. California*, No. 07-6053, *amicus* filed a brief in support of the petition for *certiorari*. In *Giles*, *amicus* also filed a brief on the merits, in support of the respondent State. In the present case, his views favor the position of the

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[1] *Amicus* has given the parties more than ten days' notice of his intention to file this brief. Petitioner has filed with the clerk a global consent to the filing of any *amicus* brief on the merits of this case. Respondent has granted consent to the filing of this brief, and a written statement of respondent's consent has been filed with the clerk. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than the *amicus* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

petitioner, the accused.

Representing two convicted defendants, *amicus* has recently filed a petition for *certiorari* in *Briscoe v. Virginia*, No. 07-11191. That petition presents the question whether a state violates the Confrontation Clause if it provides that a certificate of laboratory results may be introduced against an accused and also that the accused may, at the expense of the state, call the author of the report as his own witness. If the Court decides the present case in favor of the petitioner, the question presented by the *Briscoe* petition would be ripe for decision.

As in *Giles*, *amicus* submits this brief on behalf of himself only; he has not asked any other person or entity to join in it. He is doing this so that he can express his own thoughts, entirely in his own voice. His desire, in accordance with his academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime.

*Amicus* believes that this is an easy case – certificates of the type at issue here are plainly testimonial in nature. But, recognizing that sometimes "easy cases make bad law," *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 804 (1980) (Blackmun, J., concurring in judgment), his concern goes beyond the question presented by this case. He believes that it is important for a proper conception of the confrontation right that some of the factors that make this an easy case not be deemed essential for a statement to be deemed testimonial.

## SUMMARY OF ARGUMENT

The question presented by the petition is whether a state forensic analyst's laboratory report, prepared for use in a criminal prosecution, is a "testimonial" statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004). The Appeals Court of Massachusetts, following binding precedent of the state's Supreme Judicial Court, *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005), effectively answered in the negative. *Amicus*, like petitioner, believes that such reports are clearly testimonial.

The refusal of many courts to recognize the testimonial character of laboratory reports like the one involved here reflects a tendency that predates *Crawford*, to treat the Confrontation Clause as little more than an obstacle to efficient truth-determination. Laboratory reports prepared by government agents for the purpose of assisting prosecution can be deemed to be non-testimonial only by discarding the fundamental framework that *Crawford* established and returning in effect to the regime of *Ohio v. Roberts*, 448 U.S. 56 (1980).

Forensic reports of the type involved here should be deemed testimonial because they are clearly prepared in contemplation of use in prosecution. Such reports are highly formal, but any statement made in anticipation of prosecutorial use should satisfy any applicable formality requirement. Similarly, though government officials were involved in the creation of these reports – and indeed were the authors of them – that should not be deemed essential for them to be deemed testimonial.

Characterizing a forensic report as a business or official record, or as non-discretionary, non-adversarial, or non-accusatory, does not negate its testimonial character. Nor does the fact that the reports purported to relate the current condition of the substances being tested.

Ultimately the Commonwealth's argument is that providing confrontation of the author of forensic laboratory reports is impractical. This contention is legally immaterial and factually inaccurate.

Because laboratory evidence is an important, and growing, part of prosecution evidence, cases holding that laboratory reports prepared for use in prosecution are not testimonial signal more than a theoretical misunderstanding of *Crawford*. They also threaten a wholesale change in our system of criminal justice, to one in which the key witness against the accused testifies out of court, in writing, not necessarily under oath, and not in the presence of the accused or subject to examination by him.

## ARGUMENT

*Crawford v. Washington*, 541 U.S. 36 (2004), transformed the doctrine governing whether introduction of an out-of-court statement against an accused violates the Confrontation Clause. Under *Crawford*, the central question in making that determination is whether the statement is testimonial in nature. If it is, then for purposes of the Clause the declarant was acting as a witness in making the statement; if not, as the Court has subsequently made clear, the declarant is deemed *not* to have been acting as a witness, and the

Clause does not apply to the statement. *Davis v. Washington*, 547 U.S. 813, 823-26 (2006); *Whorton v. Bockting*, 127 S.Ct. 1173, 1183 (2007).

*Crawford* listed a few categories of statements that lay at the core of the category of testimonial statements. 541 U.S. at 52, 68. It also recited three definitions of "testimonial" that had been proposed, *id.* at 51-52. But, because the statement involved in the case would "qualify under any definition," *id.* at 52, the Court declined to adopt one. Quite the contrary, it said explicitly, "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" 541 U.S. at 68.

Two years later, in *Davis*, the Court returned to the field. The *Davis* decision resolved a pair of cases involving fresh accusations of domestic violence made in response to interrogations by police agents. Once again, the Court made its decision "[w]ithout attempting to produce an exhaustive classification of all conceivable statements." 547 U.S. at 822. Indeed, the Court declined even to produce an exhaustive definition of "all conceivable statements in response to police interrogation." *Id.*

*Amicus* believes that perhaps the most important and pressing remaining issue for the Court to resolve with respect to the meaning of the term "testimonial" is the one presented by this case – whether the term encompasses statements, such as laboratory reports, routinely produced by government agents as part of the investigatory and prosecutorial process. This is not an important and pressing issue because it is difficult. *On the contrary, amicus* believes the issue is clear-cut: Like the statement in *Crawford*, a forensic laboratory

report prepared for use in a criminal case "qualif[ies] under any definition" of "testimonial." 541 U.S. at 52. This means that the doctrine of the Confrontation Clause will be seriously weakened if decisions holding otherwise are allowed to stand.

## I. Forensic laboratory reports like the ones in this case are testimonial because they are prepared in contemplation of use in prosecution.

A forensic laboratory report of the type at issue here is clearly prepared in anticipation of use in the prosecutorial process. The Commonwealth essentially admits this fact. Brief in Opposition [hereinafter "BIO"] at 25 ("the analysts probably knew their test results would be used as evidence in a criminal prosecution"). It could hardly do otherwise, given that the governing statute provides for performance of the test when the Department of Public Health is requested to do so by police authorities, if the Department "is satisfied that the analysis is to be used for the enforcement of law." Mass. Gen. L. Ch. 111, § 12. In the view of *amicus*, this consideration should control the determination, as it does under the first and third definitions recited in *Crawford*.[2] *Amicus* has made the argument at length elsewhere, Richard D. Friedman, *Grappling with the Meaning of "Testimonial"*, 71 BROOK. L. REV. 241 (2005) [hereinafter "*Grappling*"], at 243, 251-59, and will present only a very brief sum-

[2] (1) The report is a pretrial statement similar to an affidavit "that declarants would reasonably expect to be used prosecutorially." (3) The statement was made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 541 U.S. at 51-52.

mary here.

The purpose of the Confrontation Clause is to prevent establishment of a system by which witnesses may testify against a criminal defendant out of the presence of the defendant and not subject to examination by him. But just such a system would be created if the Clause tolerated admission against the accused of any statement made with the anticipation that it will be used in prosecution. Whatever the form or audience of the statement, if the declarant understands that the statement will likely be used in prosecuting crime, then the declarant is consciously creating prosecution evidence – and so making a statement of that type has become an accepted form of providing evidence that can help convict an accused.

The Commonwealth, however, relies on *Davis* to contend that the test for determining whether a statement is testimonial cannot depend on the reasonable expectation of the declarant. "If this were the standard," the Commonwealth says, "the Court in *Davis* would have held that the 911 call from the victim reporting a domestic disturbance was testimonial because a reasonable person would know that the result of such a call would be the arrest and prosecution of the perpetrator." BIO at 24. This conclusion is incorrect. *Amicus* has argued elsewhere that this portion of *Davis* is best understood as adopting a "heat-of-the-moment" variation, rather than an "armchair" variation, of the reasonable-expectation test in the context of statements made in response to an emergency: A person with the information that was available to the declarant, but calmly analyzing the situation in the later comfort of an armchair, would almost certainly realize that the report would likely

lead to the prosecution of the defendant. But the *Davis* Court evidently regarded as decisive what it perceived to be the situation of the declarant as she was at the actual time she made the statement, in the heat of the moment and in clear distress. Richard D. Friedman, Crawford, Davis, *and Way Beyond*, 15 J. L. & Pol. 553 (2007) [hereinafter "*Way Beyond*"], at 562-63. In that situation, it is far less likely that the declarant would focus on the possible legal consequences of her statement. The 911 case was, according to the *Davis* opinion itself, a difficult case, 527 U.S. at 829 (characterizing *Hammon*, involving a statement to a responding officer, deemed testimonial, as "much easier" than the 911 case). The Court's resolution of that case should not control the standard in unrelated contexts for determining whether a statement is testimonial.

## II. The certificates satisfied any applicable requirement of formality – but a statement made in anticipation of use in prosecution should satisfy any such requirement.

There is no doubt that the laboratory report in this case, signed under oath pursuant to the statutory requirement, was a formal statement; on this ground, it plainly satisfies the second of the three definitions presented by *Crawford*, 541 U.S. at 51-52 ("extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in

judgment)). But *amicus* believes that this formality was not required for the statement to be characterized as testimonial. Had the analyst reported the test results to the prosecutor in a telephone conversation, or by passing along hand-written markings on a notepad, the statement would have been equally testimonial. The key factor is that the report was made with the anticipation that it would be used in prosecuting crime.

*Amicus* believes that, if there is a formality requirement for a statement to be deemed testimonial, "it adds nothing to the requirement that the statement be made in anticipation of prosecutorial use," *Way Beyond, supra*, 15 J. L. & Pol. at 569:

> [F]ormalities, including the oath and opportunity for cross-examination, are required conditions of acceptable testimony. A statement is not rendered non-testimonial by the absence of formalities; rather, if the statement is genuinely testimonial in nature, the lack of formalities makes the statement unacceptable. A rule that only formal statements will be characterized as testimonial is therefore theoretically backwards. Moreover, it creates a perverse incentive: those wanting to give or take testimony without it being subjected to confrontation could simply do so informally.

*Id.* at 567.

*Amicus* therefore submits that development of a sound conception of the Confrontation Clause will be best promoted by avoiding the suggestion of an independent formality requirement. That is, if the

statement was made in anticipation that it would be used in investigation or prosecution of crime, characterizing it as informal should not cause it to be deemed non-testimonial.[3]

## III. Government officials were authors of the reports involved here – but government involvement in creation of the reports was not essential to characterize them as testimonial.

Another addition that some courts have incrusted onto the definition of "testimonial" is that a statement cannot be testimonial unless a government agent was involved in its creation. *E.g.*, *People v. Vigil*, 127 P.2d 916 (Col. 2006). That is not an issue here, because a government official was the *author* of the report.[4] But

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[3] Note, for example, that in *Hammon v. Indiana*, No. 05-5705, decided together with *Davis*, this Court said, "It was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his 'investigat[ion].'" 547 U.S. at 830. *Davis* also said that it is not "conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition." *Id.* at 826. *Amicus* recognizes, of course, that in *Davis* the Court also said, "We do not dispute that formality is indeed essential to testimonial utterance." *Id.* at 830 n.5. Friedman, *Way Beyond*, *supra*, 15 J. L. & Pol. at 566-71, offers an extended argument that the best understanding of this passage is that "[i]f there is a formality requirement, it is satisfied by demonstrating that it was objectively apparent to the declarant that the interrogation was being held for prosecutorial purposes."

[4] Similarly, a theoretical issue that arises in the context of police interrogations – whether the testimonial quality of the statement should be judged from the perspective of the declarant or from

*amicus* submits that it is important to avoid any suggestion that government involvement in creation of a statement is necessary for the statement to be characterized as testimonial. A statement furnished to a prosecutor for use in prosecution should be considered testimonial even though the prosecutor played no role in creating the statement. *See Davis*, 547 U.S. at 822 n.1 ("The Framers were no more willing to exempt from cross-examination volunteered testimony . . . than they were to exempt answers to detailed interrogation."). And the same is true of a statement made to a private individual who is used as a conduit for passing the statement along to prosecutorial authorities. Friedman, *supra*, *Grappling* 71 BROOK. L. REV. at 247, 259-63.

## IV. Characterizing a forensic laboratory report as a business or official record does not negate its testimonial character.

In concluding that forensic lab reports are not testimonial, some courts, including the Massachusetts Supreme Judicial Court, have drawn on the reference in *Crawford* to the fact at the time of the adoption of the Sixth Amendment there were already several exceptions, including one for business records, that "by their nature were not testimonial." 541 U.S. at 55.[5] Records fitting within the limited "shop book" rule extant as of 1791, *see* 5 JOHN HENRY WIGMORE,

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that of the interrogator, *e.g.*, *Way Beyond*, *supra*, 15 J. L. & Pol. at 559-63 – does not arise here.

[5] *See* Commonwealth v. Verde, 827 N.E.2d 701, 703 (Mass. 2005) ("a drug certificate is akin to a business record and the confrontation clause is not implicated by this type of evidence").

EVIDENCE IN TRIALS AT COMMON LAW (J.H. Chadbourn rev. 1974) [hereinafter "EVIDENCE"], at 429-30, were "by their nature . . . not testimonial" *because they were not prepared with litigation in mind.* Neither this rule nor *Crawford*'s reference to it can justify evading the Confrontation Clause by admitting classes of statements that *are* prepared for litigation.

The same is true of what is now sometimes referred to as the hearsay exception for official documents. The Commonwealth contends that there is an "ancient principle . . ., recognized at the time of the adoption of the Constitution," that admits records made by a public officer in performing his duty. *Commonwealth v. Slavski*, 140 N.E. 465, 469 (Mass. 1923), quoted in *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005), and BIO at 26. Of course, there is no unlimited principle of that type. *Slavski* itself makes this clear. The opinion cites numerous cases that admit official records – such as "weather records kept by officers under the law, the records of a postmaster, town and city records of enlistments in military service, certificate of discharge from military service on surgeon's certificate of disability, return of enumeration of proprietors by overseers, [and] record of certificate of marriage as showing residence of the husband," 140 N.E. at 468 (citations omitted). And the opinion also notes numerous categories of official records and reports that were not admissible, including "the report of an autopsy of a medical examiner giving his opinion as to the cause of death, the report of an investigation by state fire marshal as to the cause of a fire, [and] report of an inquest as to the cause of death." *Id.* (citations omitted). Even though *Slavski* indiscriminately cited criminal and civil cases, and

even though the cases it cited were all decided long after the Framing, the pattern is clear: Routine official statements not made in contemplation of litigation were readily admitted; statements made in anticipation of use in litigation almost never were. The extent to which, and the time at which, some such litigation-oriented statements were admitted is not important to resolve for present purposes. Before, during, and long after the Framing era, a prosecutor was not allowed to introduce a report that was made by a government agent with the anticipation that it would be used in prosecution of a crime.[6] *Amicus* knows of no case in the Framing era, or for many years afterwards, in which a prosecutor was allowed to introduce such a report. Even though such reports were allowed by some cases in more modern times, before *Roberts* signaled greater leniency, a rule to that effect has never been well established. *See, e.g.*, Fed. R. Evid. 803(8), subsecs. B (excluding "in criminal cases matters observed by police officers and other personnel"), C (not applicable to evidence offered by the Government in criminal cases).

A state may expand its hearsay exceptions for business and official records as far as it likes, but that will not alter the constitutional status of such records. If a document is prepared for litigation, it is testimonial in nature whether or not the state chooses

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[6] Thus, according to Wigmore, magistrates' notes of testimony taken by them at committal hearings were inadmissible (even though valid proof of the testimony would be admissible, as for impeachment), in the absence of the magistrate (or of the clerk, if he could use the notes as an aid to refresh his memory) through the 18th century; the earliest case cited by Wigmore admitting such notes, without calling the magistrate or clerk, was decided in 1834. 5 WIGMORE, EVIDENCE, *supra*, at 780.

to label it a business or official record. *Cf. Palmer v. Hoffman*, 318 U.S. 109, 114 (1943) (refusing to apply hearsay exception to reports for which the "primary utility is in litigating, not in railroading"). And if documents of that type are routinely prepared for litigation, that simply means that the state, by admitting them against a criminal defendant absent live testimony of the authors, has countenanced a practice that routinely violates the confrontation right.

## V. That the certificates purported to relate the current condition of the substances being tested does not negate their testimonial character.

The Commonwealth contends that the certificates are not testimonial because they purport to relate the current condition of the substances being tested rather than any past event. BIO at 27-28. *Cf. People v. Geier*, 161 P.3d 104, 139 (Cal. 2007) (report "constitute[s] a contemporaneous recordation of observable events rather than the documentation of past events."). But that fact is immaterial. There is no principle that a statement that would otherwise be testimonial is removed from the scope of the Confrontation Clause because it reports on a contemporaneous condition or event.[7] If that were the law, there would be no need for live testimony describing a crime scene; the report of a police officer (or of anyone else) made while observing the scene

[7] *Davis*, in holding that statements made "to enable police assistance to meet an ongoing emergency," 547 U.S. at 822, does not suggest that any statement made about any contemporary event or condition is not testimonial.

could be introduced instead. Indeed, if the Commonwealth's theory were correct, the Confrontation Clause would allow a prosecution expert to present to a jury her assessment of the current condition of an object or material before her, and then leave the courtroom without ever subjecting herself to cross-examination – because her courtroom statement would not be considered testimonial in nature.

## VI. Characterizing the certificates as non-discretionary, non-adversarial, or non-accusatory does not negate their testimonial nature.

The Commonwealth argues that the testing reported in the certificates "was performed in a non-adversarial setting," BIO at 28 – a strange characterization for testing of suspected cocaine performed at the request of police in a state laboratory. *Cf. Crawford*, 541 U.S. at 66 ("The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers."). It also argues that the certificates did not in themselves "accuse Petitioner of any crime," BIO at 29 – though of course they were offered to prove elements of the crime charged. And the Massachusetts Supreme Judicial Court has said that certificates of this sort are "neither discretionary nor based on opinion," *Verde supra*, 827 N.E.2d at 705. None of these arguments has any merit.

Application of the Confrontation Clause is not limited to witnesses who might be considered

adversaries of the accused. Indeed, Sylvia Crawford, wife of the defendant Michael Crawford, clearly was not an adversary of his.

Nor is application of the Clause limited to testimony that is accusatory in nature; the Clause gives the accused person the right to be confronted with "the witnesses against him," not merely with "his accusers." The Clause obviously applies to a witness who testifies to nothing more than the presence of the accused near the scene of a crime, even though that testimony is utterly non-accusatory.

Finally, testimony that is neither discretionary nor based on an opinion plainly falls within the heart of the Clause: An eyewitness who is asked to do nothing more than relate what she saw is the paradigmatic example of a witness subject to the Clause.

## VII. Arguments based on the supposed reliability of the evidence and impracticality of providing confrontation are legally immaterial and factually inaccurate.

*Amicus* believes that the arguments presented above demonstrate clearly in principle that the certificates are testimonial. Ultimately, the Commonwealth's argument comes down to one of practicality, based on three assertions:

(a) that the certificates are highly reliable, BIO at 26 ("the analysts . . . were state officials simply recording the 'results of a well-recognized scientific test,'" quoting in part *Verde*, *supra*, 827 N.E.2d at 705);

(b) that confrontation of the analysts is of little

value, BIO at 28 ("had the analysts been called to testify, they 'would merely have authenticated the document' and likely would have been 'unable to recall from actual memory information related to [the certificate's] specific contents,'" quoting in part *State v. O'Maley*, 932 A.2d 1, 13 (N.H.), *petition for cert. filed*, No. 07-7577 (Nov. 7, 2007); and

(c) that providing for confrontation would be unduly expensive. BIO at 34-38 (bright-line rule characterizing forensic lab reports as testimonial, and therefore imposing "the burden of having the laboratory personnel called as witnesses in every criminal case where forensic evidence is at issue," "threatens the efficient administration of justice").

All three of these propositions are legally immaterial and factually incorrect.

(1) That characterizing a statement as reliable does not relieve it from the requirements of the Confrontation Clause is the central holding of *Crawford*. 541 U.S. at 61 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."). And the vulnerabilities of lab reports are well established, Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 491-500 (2006); such reports are far less reliable than has often been supposed.

(2) The Constitution does not make the accused's right to be confronted with a prosecution witness dependent on a judicial assessment of the likely value of the confrontation. *Crawford*, 541 U.S. at 67 ("The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we . . . lack authority to replace it with one of our own

devising.").

Moreover, confrontation of the analyst does in fact have great potential value, *even assuming* the analyst does not remember the particular test at issue. At the very least, it allows the accused to cross-examine the analyst about the laboratory's general procedures. Doing so could well reveal significant and pervasive problems. And the prospect of facing searching cross-examination tends to make forensic laboratories careful to adhere to proper procedures; put another way, removing that prospect will almost certainly tend to make laboratories laxer in implementing sound standards and procedures.

Furthermore, even though some forensic reports may be so mundane that the analyst is unlikely to remember them for long, that is not so in all circumstances. *See, e.g., State v. Craig*, 853 N.E.2d 621 (Oh. 2006), *cert. denied*, 127 S.Ct. 1374 (2007) (gruesome autopsy report).

Finally, to the extent that the analyst suffers memory loss between the time the test is performed and the time he testifies subject to confrontation, the Commonwealth has the ability to mitigate or eliminate the problem. It can hold trials promptly, and it can offer the accused an early opportunity for confrontation at a pretrial deposition or other proceeding. That the Commonwealth fails to take reasonable steps to ensure that the accused can exercise the confrontation right in a timely manner is not a ground for dispensing with the right altogether.

(3) The criminal justice system would, no doubt, be cheaper and more efficient (at least in the short run) if the confrontation right did not exist. So too would it be

cheaper and more efficient if it did without juries, or lawyers, or even judges, or the need to present evidence. But our system of criminal justice requires these procedures, and does not make them subject to a case-specific cost-benefit analysis. "Dispensing with confrontation" because it would be too expensive, like dispensing with it "because testimony is obviously reliable," is similar to "dispensing with jury trial because a defendant is obviously guilty" – and it "is not what the Sixth Amendment prescribes." *Crawford*, 541 U.S. at 62. The petitioner was sentenced to three years in prison, and the reports at issue here – which were offered to prove not only the presence but also the quantity of cocaine – were a crucial part of the evidence. The Constitution is not unreasonable in demanding that the witness who prepares these critical reports testify in person in the presence of the accused.

Besides, a state has ample means of limiting cost and yet allowing the accused to be confronted with the author of a forensic report. First, it can provide an opportunity for confrontation quite efficiently, before trial, by deposition. Indeed, even if the state chooses to use a limited number of analysts, so that often the analyst who prepares a report lives and works a considerable distance from the place of trial, depositions can reduce cost considerably, because the analyst could give several in one city on a single day. Especially if the deposition is video-taped, so that it preserves evidence of the witness's demeanor, the courts should then be rather generous in treating the author as unavailable to testify at trial, by virtue of distance or lack of memory or both. Given that the witness had testified subject to an opportunity for

cross-examination, the Confrontation Clause would then pose no obstacle to admission of the report or of the deposition testimony.

Second, a state can validly provide that if an accused does not make a timely demand for confrontation, then a lab report may be admitted without the analyst testifying. *Cf. State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006) (providing criteria for such statutes). If in fact the confrontation would have little value for the accused, then the accused would often decline to make the demand, and so waive the right.[8]

The Confrontation Clause sets out a basic principle of criminal trial procedure. Often it applies to testimony that a court might deem reliable, and often it necessarily entails considerable expense. The administration of justice has not ground to a halt in those states that, unlike Massachusetts, have recognized that this central protection of our system contains no exemption for officials who prepare critical prosecution evidence by writing laboratory reports.

## CONCLUSION

Forensic laboratory reports prepared for use in prosecution have become a pervasive part of our criminal justice system. This development holds out

[8] *Amicus* does *not* believe that a state can satisfy the Confrontation Clause by providing that if the accused wishes confrontation he must subpoena the analyst as his own witness. Indeed, the pending petition for *certiorari* in *Briscoe and Cypress v. Virginia*, No. 07-11191, in which *amicus* is counsel for petitioners, challenges the validity of this burden-shifting procedure, which would eviscerate the confrontation right.

the possibility of improved crime detection and increasing accuracy in fact-finding. But it also means that if decisions like the one below, approving the introduction of reports of tests without the author of the report testifying subject to adverse examination, our criminal justice procedure will have been fundamentally altered: Trial by certificate will become a prominent fixture in it. The witness providing the information essential to conviction will testify out of court, in writing, not necessarily under oath, and not in the presence of the accused or subject to examination by him.

It therefore should be clear that forensic lab reports are testimonial, but Massachusetts is far from alone in holding to the contrary. Many courts still appear to regard *Crawford* as an obstacle that can be avoided by new forms of words rather than as a fundamental reassertion of one of the central protections of our criminal justice system. This Court should not only set these courts straight but also ensure that the transformation wrought by *Crawford* is not seriously undermined.

For the foregoing reasons, the Court should reverse the decision of the Appeals Court of Massachusetts.

Respectfully submitted,
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# AMICUS CURIAE BRIEF

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IN THE

# Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,

*Petitioner,*

v.

MASSACHUSETTS,

*Respondent.*

**On Writ of Certiorari**
**to the Appeals Court of Massachusetts**

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*Amici curiae* respectfully submit this brief in support of Petitioner pursuant to Supreme Court Rule 37.3.[1] *Amici* urge the Court to reverse the judgment of the Appeals Court of Massachusetts.

## STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amici* are evidence professors who have published extensively on the Confrontation Clause. Notably, each has written on its interaction with expert testimony or with forensic examinations. This case involves a critical element of Confrontation Clause jurisprudence: whether after *Crawford v. Washington*, 541 U.S. 36 (2004), the Court should consider forensic reports as testimonial. Each *amicus* has devoted a significant portion of his or her research agenda to this topic.

Jennifer Mnookin serves as Vice Dean and Professor of Law at U.C.L.A. Law School. She has written extensively on expert evidence, forensic science evidence, and other topics. Her article, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington, 15 J. L. & POL'Y 791 (2007), examines the intersection between the Confrontation Clause and expert testimony. She is a co-author of one treatise, THE NEW WIGMORE: EXPERT EVIDENCE (2003), and has served as Chair of the Evidence Section of the American Association of Law Schools.

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amici curiae*, and their consent letters are on file with the Clerk's Office.

Paul C. Giannelli is the Albert J. Weatherhead III and Richard W. Weatherhead Professor of Law at Case Western Reserve University School of Law. He has written nine books on evidence and criminal justice, including the following: PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE (2d ed. 2006); KENNETH S. BROUN, ROBERT P. MOSTELLER & PAUL C. GIANNELLI, EVIDENCE: CASES AND MATERIALS (7th ed. 2007); and PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE (4th ed. 2007).

Edward J. Imwinkelried is the Edward Barrett Jr. Professor of Law at U.C. Davis Law School. He has published numerous books and treatises on evidence, including his co-authored work with Paul Giannelli, SCIENTIFIC EVIDENCE (4th ed. 2007). His article, *"This is Like Deja Vu All Over Again": The Third, Constitutional Attack on the Admissibility of Police Laboratory Reports in Criminal Cases*, 38 N.M. L. REV. (forthcoming 2008), http://ssrn.com/abstract=1080059, examines expert evidence and the Confrontation Clause. In addition to his scholarly contributions, Imwinkelried has served as the Chair of the Evidence Section of the American Association of Law Schools.

Robert P. Mosteller is the Harry R. Chadwick, Sr. Professor of Law at Duke University School of Law. He has written on a wide variety of evidentiary topics, including recently on the definition of "testimonial" under *Crawford.* His articles include *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917 (2007); *Confrontation as Constitutional Criminal Procedure:* Crawford*'s Birth Did Not Require that* Roberts *Had to Die*, 15 J. L. & POL'Y 685

(2007); and Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses,* 39 U. RICH. L. REV. 511 (2005).

Myrna Raeder is the Justice Marshall F. McComb Professor of Law for 2008-2009 at Southwestern Law School. Professor Raeder is the co-author of two books on evidence in addition to scores of scholarly articles on procedural issues and evidence. Her article, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay and Confrontations after* Davis, 82 IND. L.J. 1009 (2007), considers the testimonial nature of juvenile testimony in child abuse cases.

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## SUMMARY OF THE ARGUMENT

Holding that forensic reports are testimonial under *Crawford* will not impose an undue burden upon the government. Few criminal cases actually involve contested expert testimony, and other mechanisms exist—such as stipulations and waivers—that mitigate many administrative costs. *Amici* also suggest that, to the extent the Court deems it necessary, it can creatively reconcile confrontation concerns with the need for the practical administration of justice, by permitting fully confronted video testimony or surrogate experts to

interpret reports authored by genuinely unavailable forensic examiners.

## ARGUMENT

This case involves the functional consequences of criminal defendants' evolving Confrontation Clause rights after *Crawford v. Washington*. 541 U.S. 36 (2004). *Amici* adopt Petitioner's well-developed, persuasive argument regarding the testimonial nature of forensic reports. Virtually all of the available scholarship on the question concurs with Petitioner's conclusion that these laboratory reports ought to be deemed testimonial. *See, e.g.*, Edward J. Imwinkelried, *"This is Like Deja Vu All Over Again": The Third, Constitutional Attack on the Admissibility of Police Laboratory Reports in Criminal Cases*, 38 N.M. L. REV. (forthcoming 2008) ("Imwinkelried"), *available at* http://ssrn.com/abstract=1080059; Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 504-05 (2006) ("Metzger"); Jennifer Mnookin, *Expert Evidence and the Confrontation Clause after* Crawford v. Washington, 15 J.L. & POL'Y 791, 797-801 (2007) ("Mnookin"); Recent Case, *Evidence–Confrontation Clause–Second Circuit Holds that Autopsy Reports Are Not Testimonial Evidence–United States v. Feliz*, 467 F.3d 227 (2d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3438 (U.S. Feb. 20, 2007) (No. 06-8777), 120 HARV. L. REV. 1707 (2007); *see also* 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 6.04(c) n.233 (4th ed. 2007) ("GIANNELLI & IMWINKELRIED") (collecting cases for the proposition that "lab reports are testimonial in nature"); DAVID KAYE, DAVID BERNSTEIN & JENNIFER MNOOKIN, THE NEW WIGMORE § 3.10 (2007 Supp.).

While strongly agreeing with Petitioner's conclusion, we recognize that requiring live testimony from the authors of such reports will raise a number of practical and conceptual issues that do not have immediately obvious answers. *Amici* seek, therefore, to address only the question of whether requiring in-court testimony by forensic experts will impose undue or insuperable burdens on the government. We believe that it will not, and furthermore, that courts will be able to devise procedures for making the burdens associated with *Crawford*'s extension to forensic reports practically manageable.

Live testimony requirements will likely impose relatively modest burdens because only a small proportion of criminal cases involve contested expert testimony. Moreover, the creative use of technology can reduce the burdens associated with in-court testimony while still preserving the most critical aspects of Confrontation. In addition, in some cases surrogate experts may be able to testify about reports that would otherwise be excluded because of author unavailability. For these reasons, we believe that the government can effectively use forensic reports while adhering to *Crawford*'s requirements without unreasonable inconvenience.

## I. RECOGNIZING THE TESTIMONIAL CHARACTER OF FORENSIC EVIDENCE WILL NOT UNDULY BURDEN THE CRIMINAL JUSTICE SYSTEM

Although this Court's precedents make clear that forensic reports are testimonial, the State suggests that this entire category of reports should be

exempted from the requirements of the Confrontation Clause because of the administrative expense of making forensic experts available to testify. (Br. in Opp. at 34.) The principal burdens to the State are the forensic examiners' time and travel costs. *Id.*; *see* Mnookin at 835-36 (recognizing that "[i]t may be a significant drain on limited forensic science budgets to require that every forensic test be presented in court by whoever actually performed the test, unless that examiner is unavailable and the defendant had a prior opportunity for cross-examination").

While the State's administrative and fiscal concerns are legitimate, they cannot control the scope of the "bedrock procedural guarantee," *Crawford*, 541 U.S. at 42, provided by the Confrontation Clause. The fact that a safeguard guaranteed a criminal defendant is costly or time-consuming is not a sufficient basis for denying that protection, if it is constitutionally required. For example, the rights to the assistance of counsel, and to the services of a psychiatrist, are undoubtedly costly to the public, but those costs must be borne as the natural consequence of the constitutional guarantee. *See Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (holding "that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court"); *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (requiring the State to "assure the defendant access to a competent psychiatrist" to assist in his defense when his "sanity at the time of the offense is to be a significant factor at trial"). Indeed, *Ake* is strikingly parallel; in *Ake* as here, the State argued that it would be a "staggering burden" to provide psychiatric assistance to indigent criminal

defendants. 470 U.S. at 78. The Court rejected this argument, holding that the State's interest "in its economy" did not outweigh "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk . . . ." *Id.* at 78-79.

Moreover, the State's administrative concerns should not be exaggerated. While *Crawford* does lead to some practical difficulties, these may often not be so severe as is feared by courts and prosecutors understandably anxious about change. Although the data are not completely clear, only a relatively small portion of criminal cases would ever require live expert witness testimony. Furthermore, as we suggest below, there are procedures that the prosecution may employ, consistent with the core right of confrontation, to further obviate the need for forensic examiner testimony.

### A. Only A Tiny Fraction Of Criminal Cases Is Likely To Be Affected

Live forensic testimony is likely to be unnecessary in most cases, because very few criminal prosecutions actually proceed to trial. In 2004, approximately 1.15 million defendants were convicted of felony crimes nationwide; about 67,000 of those convictions, or 6%, were in the federal courts. Bureau of Justice Statistics, Dep't of Justice, Felony Sentences in State Courts, 2004, at 2 (2007). The vast majority of those cases never went to trial. In state courts, around 95% of all convictions in 2004 were obtained through a guilty plea. *Id.* Similarly, 96% of those individuals convicted in the federal courts in 2004 pleaded guilty. Bureau of Justice Statistics, Dep't of Justice, Compendium of Federal

Justice Statistics, 2004, at 62 (2006). This figure has remained relatively constant over the past decade. Bureau of Justice Statistics, Dep't of Justice, Sourcebook of Criminal Justice Statistics Online, at tbl.5.22.2007 (2008), *available at* http://www.albany.edu/sourcebook/pdf/t5222007.pdf (last visited June 16, 2008). Furthermore, in 2007, of the 88,014 total defendants prosecuted in federal court, only 2,917, or 3% of all cases, actually proceeded to trial. *Id.* Thus, of the 1.15 million convictions nationwide, only a very small fraction are obtained through a criminal trial, where a defendant's Confrontation Clause rights have practical import.

Anecdotal evidence suggests that forensic examiners are actually called to testify in a small proportion of cases in which they could be called to testify. For instance, the Supreme Court of Louisiana has cited statistics demonstrating that forensic experts testified in a mere 10% of the cases in which subpoenas were issued. *State v. Cunningham*, 903 So. 2d 1110, 1120 (La. 2005). This figure is consistent with testimony presented to the Senate Judiciary Committee by the Kansas Bureau of Investigation, whose toxicology and chemistry analysts testified in only 8% of the cases in which they were subpoenaed. Brief of Kansas Attorney Gen. as *Amicus Curiae* at 4, *Kansas v. Crow*, 974 P.2d 100 (Kan. 1999) (No. 97-79287-5) (citing Kansas Assistant Attorney General Kyle G. Smith, Testimony Before the Senate Judiciary Committee (Feb. 19, 1993)).

The simple explanation for these figures is that in the typical case, a defendant impairs rather than

enhances his case by insisting upon an extended and substantially uncontroverted presentation of scientific evidence on a critical element of the government's proof. As *Old Chief v. United States* illustrates, it is often counterproductive for the defense to demand that the prosecution present live testimony available to it. 519 U.S. 172, 189 (1997). Experienced defense counsel do not insist on the live presentation unless there is some reason to believe the evidence is susceptible to challenge. Thus, as the ensuing sections explain, criminal defendants frequently seek to avoid the prosecution's harmful forensic evidence through stipulations and "notice-and-demand" procedures. *See State v. Hancock*, 825 P.2d 648, 651 (Or. Ct. App. 1992) (emphasizing a legislative determination that "the accuracy of the chemical analysis of an alleged control substance by [a forensic] laboratory is almost never challenged"); Brief for the Commonwealth of Mass as *Amicus Curiae* at 7, *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005) (No. SJC-09320) ("Generally, defendants do not object to the admission of drug certificates most likely because there is no benefit to the defendant from such testimony.").

### B. Burdens Relating To Forensic Evidence Are And Will Continue To Be Alleviated By Stipulations And Waivers

Confrontation rights, like many other constitutional rights, can be waived. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). There are at least two cost-saving mechanisms by which a criminal defendant could effectively waive his right to confront a forensic examiner: stipulations and "notice-and-demand" statutes. Both mechanisms preserve

defendants' confrontation rights while alleviating the burdens on the government. Indeed, many states have already implemented some form of notice-and-demand statute, ostensibly to prevent a drain upon the public fisc.

### 1. Stipulations

Stipulations, which are used in criminal as well as civil cases, "take a number of forms." 22 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5194 (1978 & Supp. 2008) ("WRIGHT & MILLER"). First, "[t]he parties or their counsel can agree that certain facts shall be taken as true for purposes of the litigation." *Id.* Second, the parties may stipulate "to the admission of evidence." 2 PATRICK L. MCCLOSKEY & RONALD L. SCHOENBERG, CRIMINAL LAW DESKBOOK § 16.07[4] (2007). Third, "[t]he agreement can take a less conclusive form, as when it is stipulated that a certain witness, if called, would have testified to particular facts." 22 WRIGHT & MILLER § 5194.

Stipulations are routinely used in criminal cases to establish facts that are necessary to the prosecution's case that the defendant cannot effectively dispute. In particular, they are often used in the context of expert testimony concerning forensic evidence. *See, e.g., United States v. Olivares-Vega*, 495 F.2d 827, 829-30 (2d Cir. 1974) (defendant agreed not to contest "that a laboratory analysis would show that the white powder [found in his luggage] was cocaine"); *United States v. Spann*, 515 F.2d 579, 580 (10th Cir. 1975) (defendant stipulated that if the government's chemist were called at trial, "he would

testify that in his opinion the substance" confiscated "was 'marihuana.'")

Stipulations are so common because they often benefit the courts, criminal defendants, and prosecutors alike. From the courts' perspective, stipulations serve the critical purpose of "judicial efficiency." 22 WRIGHT & MILLER § 5194. With trial court judges facing heavy caseloads, it is hardly surprising that "the general policy of the Civil and Criminal Rules is to encourage [evidentiary] stipulations," thereby saving time and lessening the potential for error. *Id.*

Prosecutors often benefit from forensic stipulations as well. If the defendant is willing to stipulate to a fact that the prosecution would otherwise have to prove, or to testimony that the prosecution would otherwise have needed to offer, the prosecution is relieved of that burden. When a criminal defendant is willing to stipulate to facts in a forensic report, or to the testimony that the government's forensic examiner is expected to give, the State's anticipated burdens may be eliminated *entirely*.

For defendants, absent a specific basis in fact for contesting the correctness of an expert's conclusion, there is little to gain and much to lose in requiring an articulate, well-credentialed expert to appear to prove an undisputed technical detail of an alleged crime. *See* Gary Muldoon, *Use of Stipulation in Criminal Cases*, 4 ISSUES IN NEW YORK CRIMINAL LAW No. 10, *available at* http://www.mcacp.org/issue38.htm (last visited June 16, 2008) (noting that, through stipulations, criminal defendants can avoid

"a parade of unfavorable witnesses called by the prosecutor," as well as the risk that the jury will "be more impressed with [a] witness's credentials than the subject matter testified to"). Instead, through a stipulation, the defendant may be able to narrow the dispute, and shift the focus of the trial to more realistically winnable issues. By doing so, the defendant may enhance his credibility and focus greater attention on the issues that are central to a plausible defense. 4-App. E2-1 CRIMINAL LAW ADVOCACY § App. E2-1.03 Form 2A-3.

Although confrontation serves a critical function in some criminal trials, in others the defendant has no credible basis—and thus no strategic reason—for challenging facts as stated in forensic reports, or for trying to undermine the testimony that a forensic examiner would offer. For example, as was perhaps the case in *Spann* and *Olivares-Vega*, there may be no real debate over the identity or quantity of a controlled substance found upon the defendant. The defendant may therefore seek to minimize the impact of those facts, and to focus upon other, more promising battlegrounds. Hence, the defendant might agree to stipulate to "the fact that drugs were sold," but contest the charges on the ground of "mistaken identity," 4-App. E2-1 CRIMINAL LAW ADVOCACY § App. E2-1.03 Form 2A-4, insanity, or any number of other defenses. The stipulated fact or testimony may be "totally compatible with [the defendant's] theory of the case." *Id.* Form 2A-3; *see State v. Miller*, 790 A.2d 144, 153 (N.J. 2002) (noting that in the "vast majority" of drug cases involving forensic reports, the defendant does not oppose the admission of the laboratory certificate).

While stipulations generally ease the potential burdens presented by live forensic testimony, that burden can be further reduced by procedural provisions which encourage or require pretrial resolution of stipulation issues. *See* Metzger at 529-30 (providing a model statute with stipulation procedures to be used for forensic reports and testimony). When the prosecution knows in advance that live forensic testimony will be unnecessary, the government is in an even better position to plan a succinct, coherent case-in-chief.

**2. Notice-and-Demand Statutes**

Another method of reducing the potential burden entailed by the presentation of forensic expert evidence is utilization of "notice-and-demand" statutes, which create an orderly mechanism by which prosecutors may save time and effort, while affording the defendant a full, fair opportunity to confront his accusers. Under these statutes, if the prosecution intends to use forensic evidence at trial in lieu of live testimony from the forensic examiner, the prosecution must serve "notice" to the defense of its intent to rely on such evidence. The defendant then has the opportunity to object to the introduction of the laboratory report as evidence and to "demand" that the prosecution produce the forensic witness at trial. *See* Mnookin at 797-98.

In the typical notice-and-demand statute, the prosecution must first provide timely notice of its intent to rely on a forensic certificate. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 10-306(b)(1)(ii) (West 2008) ("[I]f the State decides to offer the test results without [live testimony], it shall, at least 30 days

before trial, notify the defendant . . . ."). The prosecution must also give the defense a copy of the certificate. *See, e.g.*, MICH. COMP. LAWS § 600.2167(3) (2008) (requiring the prosecutor to provide a copy of the forensic report to the defense no fewer than five days prior to a preliminary examination). Following proper notice, the defense must then make timely demand to cross-examine the expert. Timeliness can be explicitly defined by statute. *See, e.g.*, DEL. CODE. ANN. tit. 10, § 4332(a)(1) (2008) (requiring written demand filed by the defense "at least 5 days prior to the trial"). Upon timely demand by the defendant, live testimony is required in lieu of the certificate. Several states employ this type of notice-and-demand procedure.[2]

Like stipulations, notice-and-demand statutes can benefit prosecutors, while still protecting confrontation rights. Under these statutes, prosecutors must present live testimony from forensic examiners only in cases in which criminal defendants affirmatively choose to exercise their confrontation

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[2] Those states are Delaware, DEL. CODE. ANN. tit. 10, §§ 4330-4332 (2008); Illinois, 725 ILL. COMP. STAT. 5/115-15 (2008); Iowa, IOWA CODE § 691.2 (2008); Maryland, MD. CODE. ANN., CTS. & JUD. PROC. §§ 10-306, 10-914 (West 2008); Michigan, MICH. COMP. LAWS § 600.2167 (2008); Nevada, NEV. REV. STAT. §§ 50.315, 50.320, 50.325 (2007); Ohio, OHIO REV. CODE ANN. § 2925.51 (West 2008); Oklahoma, OKLA. STAT. ANN. tit. 22, § 751.1(B) (2008); Texas, TEX. CODE CRIM. PROC. ANN. art. 38.41 (Vernon 2007); and Washington, WASH. ST. SUPER. CT. CR. 6.13 (2008). *See* Metzger at 481-82 (criticizing these "notice and demand" statutes, but finding them to be "[t]he most 'benign'" of the various forms of "*ipse dixit*" statutes that permit the introduction of forensic reports without live testimony from the examiner).

rights. When the defendant fails to exercise his right, live testimony need not be presented, and the administrative and fiscal burdens on the government are lessened.

To be sure, notice-and-demand procedures are more burdensome to defendants than stipulations; a defendant may lose his ability to cross-examine a forensic examiner by failing to satisfy the statutory demand obligations. *See, e.g.*, Metzger at 531 (discussing notice-and-demand statutes, and noting that "[l]egislators rely on . . . defen[dants'] failures [to satisfy the demand requirement] to help prosecutors get cheaper convictions."). The critical point, however, is that the defendant retains the opportunity to exercise his rights under the Confrontation Clause, and to choose when and whether to waive those rights, as the Constitution permits.[3]

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[3] These narrow notice-and-demand statutes should be distinguished from statutes that require anything more extensive than mere objection before mandating live testimony. Specifically, some states have requirements that defendants "show[] cause," before the court will compel an expert to testify. *See, e.g.*, ALASKA STAT. § 12.45.084(d) (West 2008). Tennessee, for instance, only requires live testimony "upon seasonable objection and for good cause." TENN. CODE ANN. § 40-35-311 (2008). Other statutes require counsel to affirm an actual intent to cross-examine as a prerequisite for demanding live testimony. *See, e.g.*, ALA. CODE § 12-21-302 (2008); LA. REV. STAT. ANN. § 15:501 (2008). Such "notice and demand-plus" statutes, *see* Metzger at 482-83, raise Confrontation Clause concerns, and *Amici* suggest that there is a significant difference between those and the narrow, limited statutes described in this section. Only statutes that unambiguously guarantee the defendant the opportunity to cross-examine forensic experts upon a simple demand to do so satisfy *Crawford*'s admonition that no law

### C. Burdens Can Arguably Be Further Mitigated by Scheduling Arrangements and by the Use at Trial of Fully-Confronted Videotape Records of Expert Testimony

Because of the criminal justice system's extensive reliance on plea bargaining and stipulation, the disposition of the vast majority of criminal cases does not involve in-court forensic testimony. Even when the defendant asserts his Confrontation rights and insists upon forensic science testimony, courts may be able to devise procedures to reduce the burden on the government and its experts.

Courts possess inherent authority to control their dockets and the manner in which they dispose of cases. *See, e.g., Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962). [4] Courts exercise this authority for the "economy of time and effort for itself, for counsel, and

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(continued...)

shall deprive a defendant "'of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.'" *Crawford*, 541 U.S. at 57 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)).

[4] For state authorities recognizing the courts' inherent power to control their dockets, see for example *Washington v. State*, 844 A.2d 293, 295 (Del. 2004) ("Trial courts have significant control over and discretion in the management of their dockets and the scheduling of cases."); *Fields v. State*, 879 So. 2d 481, 484 (Miss. Ct. App. 2004); *In re Jade G.*, 30 P.3d 376, 382 (N.M. Ct. App. 2001); *People v. Grove*, 566 N.W.2d 547, 559 (Mich. 1997); *Williams v. Commonwealth*, 347 S.E.2d 146, 148 (Va. Ct. App. 1986).

for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (Cardozo, J.). Most courts also enjoy constitutional or statutory authority to promulgate rules regulating matters of procedure. *See, e.g.*, FED. R. CRIM. P. 57; *Scheehle v. Justices of Supreme Ct. of Ariz.*, 120 P.3d 1092, 1099 (Ariz. 2005); *McDougall v. Schanz*, 597 N.W.2d 148, 157 n.17 (Mich. 1999); *State v. Templeton*, 59 P.3d 632, 641 (Wash. 2002). In the past, this authority has often enabled the courts to respond creatively to the recognition of new procedural rights to ensure the orderly administration of justice, while preserving constitutional safeguards.

By exercising their procedural discretion, courts could develop new processes to mitigate the costs of in-person testimony. For instance, live satellite uplinks, *see Harrell v. State*, 689 So. 2d 400 (Fl. 1997), and closed circuit television, *see Maryland v. Craig*, 497 U.S. 836 (1990), empower the jury to assess witness credibility. By showcasing a witness's tone of voice, facial expressions, and general demeanor, these technologies break down any simple dichotomy between transcripts and in-court statements. Unlike transcripts, the video image captures body language, eye contact, and affect—factors that juries evaluate when considering the reliability of testimony. These technologies afford opportunities to modernize traditional Confrontation Clause thinking by providing information the Framers thought necessary to ensure effective trials without mandating in-court testimony. These video options preserve essential information for the evaluation of credibility and demeanor that written materials lack.

Live video testimony is only one of a number of in-person substitutes that might be employed to provide the jury with a possible replacement for in-court testimony. Recorded videos, for instance, from a past hearing, might similarly alleviate administrative costs. Courts could designate specific days on which parties can examine expert witnesses. On those days, the defense counsel could conduct his cross-examination in the defendant's presence before a judge and under oath. The examination could be videotaped and played for the jury at trial. From the camera's orientation in the jury box, these videos would capture significant elements of the courtroom experience—including the defendant's reaction to testimony and the conduct of the attorneys. This form of evidence satisfies the essence of the defendant's Confrontation Clause right to an "adequate" and "prior opportunity for cross-examination." *Crawford*, 541 U.S. at 54, 57. Moreover, this procedure could minimize the expense and inconvenience to the government of producing forensic experts for cross-examination on the day of trial. This approach could also significantly reduce the disruption of laboratory analysts' work schedules.

The pretrial use of such a procedure renders the testimony permissible under *Crawford* if the forensic scientist in question were unavailable at trial. Without unavailability, it is admittedly a much more difficult question. The *Crawford* opinion did not consider this form of testimony, which so closely resembles in-court statements. 541 U.S. at 38, 54. Video alleviates many of the concerns—namely, the ability to assess witness credibility through nonverbal communication—that animated the

Framers' adoption of the Confrontation Clause. The eighteenth century sources cited by the *Crawford* Court never dreamt of a type of out-of-court statement that could convey to the jury virtually everything the jurors would have seen or heard had they been present at the time of the statement. Playing a video of earlier testimony before the jury gives the trier of fact significantly more information than a cold, one-dimensional transcript.

Our point is this: Finding forensic reports to be testimonial, but developing novel procedures for reconciling confrontation with efficiency concerns, would be far more confrontation-protecting than the alternative of writing a critical category of evidence altogether out of the Confrontation Clause's protective ambit.

None of this is to say that these alternatives obviously pass constitutional muster. Nor would we suggest that in this case, the Court must resolve all the doctrinal issues raised by these possible substitutes. Rather, we merely wish to emphasize that even if Court determines that forensic reports are testimonial under *Crawford*, courts remain well-equipped to design procedures that simultaneously guarantee the confrontation right and ensure the efficient administration of justice. The possibilities for procedural innovation reinforce our belief that allowing criminal defendants the right to cross-examine forensic experts will result in, at most, modest administrative inconvenience to the government.

## II. *CRAWFORD*S REASONING MAY PERMIT SURROGATE EXPERT TESTIMONY REGARDING FORENSIC REPORTS, FURTHER REDUCING THE PRACTICAL IMPACT OF A HOLDING THAT FORENSIC REPORTS ARE TESTIMONIAL

Precluding reports written by unavailable witnesses may necessitate that some forensic evidence that currently reaches juries no longer be admitted. [5] To that end, *Amici* suggest that *Crawford*'s reasoning—particularly its express acceptance in specified circumstances of a second-best substitute for in-court testimony—may permit a surrogate expert to introduce and testify to an unavailable expert's report.

*Crawford* acknowledges that to a degree, necessity has a legitimate role to play in Confrontation Clause analysis. More specifically, in *Crawford*, the Court permitted the introduction of a now-unavailable witness's testimonial statements if the defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 54. Within *Crawford*'s schema, a prior opportunity to cross-examine the witness is a second-best solution—not a perfect replacement for cross-examination in front of the current jury. This conclusion is both a matter of common sense and implicit in *Crawford*'s logic: If a

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[5] We should note, first, that this issue does not arise on the facts of this case. There is no evidence whatsoever of the unavailability of the forensic scientists who conducted the analysis of the controlled substance at issue in this case. *See* Petition for Writ of Certiorari at 8. However, we recognize that with some regularity, the expert who conducted the analysis at issue will, in fact, genuinely be unavailable.

prior opportunity to cross-examine were the evidentiary equivalent of contemporaneous cross-examination, there would be no justification for imposing an unavailability requirement before its use. The Court found the existence of a prior opportunity for cross-examination as constitutionally adequate in the face of the necessity produced by the witness's unavailability. *Crawford*, therefore, indicates that at least in some circumstances in which there is a meaningful but imperfect substitute for contemporaneous cross-examination, the Constitution does not command wholesale exclusion.

There may be other circumstances in which necessity coupled with a satisfactory substitute can similarly justify an exception to *Crawford*'s mandate. One of the arguments levied by lower courts to suggest that *Crawford* should not extend to forensic reports is the claim that the opportunity to cross-examine the expert has little value. Arguably, if the expert has written hundreds of similar reports, he may be unlikely to remember the specific test documented in the report; in testifying, the expert will have to rely almost exclusively on the report's contents. *Cf. Commonwealth v. Carter*, 932 A.2d 1261, 1267 (Pa. 2007) ("[C]ross-examining the chemist about the specifics of one test out of perhaps hundreds of identical tests would have been of little utility . . . ."). Some courts have invoked this argument to justify the use of a certificate in lieu of live testimony; others have relied upon it to permit reports introduced by an expert who played no role in the actual testing process. *See* Imwinkelried at 33 n.239.

Although *Amici* recognize that at times experts will not have a specific memory of the forensic tests that they have conducted, we strongly disagree that this justifies doing away with confrontation altogether, which the use of certificates of analysis in effect allows. Nor, in our view, should the possibility of a lack of specific memory justify the routine use of surrogate experts who played no part in the actual testing process. While the expert who conducted the test at issue may not always have a specific memory, there is no doubt that he sometimes will. Moreover, examining his recorded report may well jog his memory of particulars not included in the report. In addition, the ability to cross-examine the actual expert—not someone else with similar expertise—offers the factfinder better information about this particular expert's experience, credentials, abilities and credibility. Cross-examining the actual expert who conducted the test also may increase the chances of ferreting out any potential misconduct or fraud. Therefore, *Amici* propose focusing on a narrower category of instances involving a much clearer showing of unavailability.

We recognize that experts may not always be available to testify to their reports. Experts may die or leave their forensic employment and move away from the jurisdiction or otherwise be unable to testify for a multitude of reasons. The more time has passed between the forensic test and its use in court, the greater the chance that the expert who conducted the test will no longer be available. Several of the lower court cases facing such unavailability have addressed, for example, autopsies establishing the cause of death, conducted many years earlier. *See,*

*e.g.*, *Rollins v. State*, 897 A.2d 821 (Md. 2006). The original autopsy is not only likely to be the best available evidence regarding cause of death, but it is also unlikely that there will be any substitute, non-testimonial equivalent forms of evidence to establish the cause. The unavailability of the original medical examiner is in no way the fault of the State. In this circumstance, we submit that there may be alternatives to wholesale exclusion that, while second-best, may meet the constitutional mandate for confrontation.

When the scientist who conducted the original test is unavailable, having another expert retest the materials certainly represents the optimal means for protecting a defendant's Confrontation rights. In many instances, though, as with a years-old autopsy, retesting will be impracticable or literally impossible, and the necessity issue resurfaces. In narrowly circumscribed circumstances—(1) conducting another test is infeasible; (2) the original test was conducted in accordance with regularized procedures and documented in sufficient detail for another expert to understand, interpret, and evaluate the results, and (3) the original expert is now unavailable—a plausible argument exists that surrogate testimony by another qualified expert ought to be constitutionally permissible. *See* Mnookin, at 854-55.

This framework gives necessity and unavailability a larger role in confrontation analysis than *Crawford* expressly contemplates, but we submit that this proposal accords with *Crawford*'s spirit. Just as the Court permits the introduction of testimony from a prior hearing conditioned upon unavailability, the Court might permit a surrogate

expert to testify conditioned upon both unavailability and the adequacy of the documentation and procedures followed by the original expert. If the original expert detailed his procedures with elaborate care, a surrogate can both describe the tests conducted and critically evaluate the results. This is, to be sure, a second-best solution, and ought not to be resorted to without unavailability. Nor ought necessity and unavailability to be adequate grounds for making use of non-scientific testimonial statements introduced through a surrogate witness. Forensic science can rely on regularized routines and processes which can be documented in sufficient detail to permit meaningful interpretation and evaluation by others with appropriate expertise. It is the special, data-driven nature of scientific processes and scientific practice that makes the use of a surrogate expert arguably adequate when necessity demands it.

For example, suppose that an autopsy report includes not only bottom-line conclusions, but also photographs, measurements, careful descriptions of what tests were conducted, and descriptive detail to support the conclusions. While a surrogate cannot provide first-hand descriptions of conducting this particular autopsy, on cross-examination he can meaningfully respond to questions about the conclusions reached by the original examiner. The surrogate possesses the expertise to opine on the appropriateness of the tests and the soundness of the original expert's conclusions. Based on his expertise and the substantive detail provided, the surrogate can assess the legitimacy of those interpretations. Defense counsel can cross-examine him about

alternative hypotheses, tests that were not conducted, or uncertainties relating to his interpretations. Compared to cross-examining the original analyst, something of value is lost, certainly, but much is also retained.

Indeed, if the Court were to decide at some point that, while forensic reports are testimonial under *Crawford*, a surrogate expert can be used in lieu of an unavailable expert if and only if the report were sufficiently detailed to allow the surrogate to interpret it meaningfully, such a rule would have salutary effects on the practices of forensic science in general. Prosecutors and experts would have the incentive to generate forensic reports that were more detailed and more informative—reports which would permit other forensic scientists genuine insight into the underlying scientific analyses. Historically, in contrast, many expert reports produced in criminal cases have included only bottom-line conclusions. *See* GIANNELLI & IMWINKELRIED § 3.03.[6]

The Court's adoption of this position will pressure experts to generate reports that would enable a later expert to testify discerningly about the original expert's procedures and reasoning. *Amici* do not presume to prescribe a specific set of procedures to satisfy this threshold, but other parties certainly will attempt to improve standardization and documentation as this iterative process evolves.

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[6] The same holds true for many certificates of analysis, including those at issue in this case, which provided no detail whatsoever about what specific tests were conducted in order to reach the conclusion that the substance at issue was cocaine. *See* Pet. App. 24a.

This issue of unavailable experts goes well beyond the scope of what is of greatest concern in this case. *Amici* believe, however, that it requires attention, because so many lower courts have been misled by concerns regarding these relatively atypical cases such as the years-old autopsy. We wish to emphasize that concerns about a potential "parade of horribles" should not prevent the Court from holding that forensic reports are testimonial. The practical consequences of that conclusion, although not negligible, are manageable. This management may take the form of encouraging stipulations and permitting notice-and-demand statutes. It may involve considering the effects of the availability of video technology on the scope of the Confrontation right. It may also require thinking through whether there are ever circumstances in which the Court would consider a surrogate expert as a constitutionally adequate substitute for an unavailable expert. These techniques will, to the extent it proves necessary, provide mechanisms that address *Crawford*'s central concerns while remaining practically manageable and principled.

## CONCLUSION

For the foregoing reasons, as well as those in Petitioner's brief, the judgment should be reversed.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

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No. 07-591

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IN THE

# Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,

*Petitioner,*

v.

MASSACHUSETTS,

*Respondent.*

**On Writ of Certiorari to the Appeals Court of Massachusetts**

## BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, AND NATIONAL COLLEGE FOR DUI DEFENSE IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford* v. *Washington*, 541 U.S. 36 (2004).

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## INTEREST OF *AMICI CURIAE*[1]

*Amicus curiae* the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation of more than 10,000 attorneys and 28,000 affiliate members in all 50 States. The American Bar Association ("ABA") recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

Founded in 1958, NACDL promotes research in the field of criminal law, disseminates and advances knowledge relevant to that field, and encourages integrity, independence, and expertise in criminal defense practice. NACDL works tirelessly to ensure the proper administration of justice, an objective that this case directly impacts in light of its overarching importance to ensuring that criminal convictions are accurate and based upon reliable forensic evidence. NACDL's membership has long relied upon cross-examination as one of the vital means of ensuring accuracy. As such, NACDL is uniquely qualified to offer assistance to this Court in this matter.

*Amicus curiae*, the National Association of Federal Defenders ("NAFD"), was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief.

Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal-law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals. The Association joins in this brief because of the importance to its members of the issues presented by this case. Convictions in federal court routinely rest on documents such as laboratory chemical reports and other reports regarding matters ranging from ballistics analyses to the results of medical tests. NAFD is therefore uniquely qualified to address the importance of subjecting these reports to thorough cross-examination.

*Amicus curiae* the National College for DUI Defense is a non-profit professional organization with approximately 850 members, specializing in issues related to the defense of persons charged with driving under the influence.

## SUMMARY OF ARGUMENT

Attorneys for criminal defendants, like *amici*, are persistently forced to contend with the automatic admission of laboratory or other forensic reports, upon which much of the government's case rests. Prepared at the behest of law enforcement, these forensic reports are used to establish critical facts, including the identification of a defendant through fingerprint or DNA analysis, and the identification of a weapon used in a crime through ballistics analysis. In drug case such as this one, a forensic analysis is the sole means by which to prove the contraband nature of the substance, along with its type and quantity. Such critical facts can establish not only a

defendant's guilt, but also the range of punishment to which the defendant is exposed.

To be certain, only a limited number of criminal proceedings will ever involve contested expert testimony. See Br. of *Amicus Curiae* Law Professors in Supp. of Pet. But in those few cases where a defendant seeks to challenge the accuracy of forensic evidence, that evidence, as with all other forms of testimony, must be subject to the adversary process, including cross-examination of a forensic examiner.

In this case, the Commonwealth of Massachusetts secured a conviction against Petitioner by relying on forensic chemical reports that were prepared in anticipation of litigation and that purported to establish that Petitioner possessed a certain quantity of cocaine. Despite indications that the forensic reports were unreliable, Petitioner was never afforded the opportunity to cross-examine the forensic examiners about the bases of their conclusions regarding the type and quantity of drug. The jury was instructed that the laboratory reports alone permitted it to conclude the seized bags contained cocaine. It found Petitioner guilty of distributing and trafficking in cocaine.

Permitting convictions on the basis of evidence that is untested by the crucible of cross-examination plainly flouts the Sixth Amendment guarantee that a criminal defendant be "confronted with the witnesses against him," and is contrary to this Court's decisions in *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *Davis* v. *Washington*, 547 U.S. 813 (2006). See Merits Br. of Pet'r at 13-18. Admitting laboratory reports like these subverts the Confrontation Clause's mission "to advance . . . the accuracy of the truth-determining process in criminal trials." *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion).

To avoid errors and falsifications, the Government should be required to provide the defense with an opportunity to cross-examine live witnesses who present this evidence. The prospect of cross-examination will provide a powerful incentive for witnesses to exercise more care in preparing forensic documents and in giving testimony before and during trial. The prospect of cross-examination will also encourage prosecutors to thoroughly vet their cases, cautiously collect forensic evidence, and closely examine error rates. Finally, cross-examination will serve as an invaluable aid to the jury in its role as trier of fact.

## ARGUMENT

### I. THE CONFRONTATION CLAUSE ENSURES THE RELIABILITY OF FORENSIC REPORTS.

The cornerstone of just criminal process is truth. It is for this purpose that the Confrontation Clause exists. But far from being a lofty guarantee of truth, the Confrontation Clause grants a defendant a procedural right to test the reliability of evidence in a particular manner: through "testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61-62. It reflects the Framers' practical judgment "about how reliability can best be determined," *id.*, at a criminal trial, i.e., "by subjecting" that evidence "to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland* v. *Craig*, 497 U.S. 836, 845 (1990). As this Court has observed, "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials." *Dutton*, 400 U.S. at 89.

These procedural guarantees—i.e., requiring accusers to both appear in court before the defendant and to subject themselves to the defendant's questions—are practical aids for determining the truth. In particular, the Confrontation Clause enhances the reliability of the fact-finding process by serving two key interests: the need to encourage witnesses to carefully prepare their testimony and the need to give the Government an important incentive to vet its cases and its evidence. Both interests are implicated when the challenged hearsay evidence is laboratory reports.

The very possibility of confrontation encourages witnesses to more carefully prepare their testimony for trial and to be able to defend their viewpoint. To be sure, even with cross-examination, there will always be witnesses who lie or withhold information that might have exposed their testimony as falsely premised or unreliable. Nevertheless, the potential for confrontation, of having to defend one's statement before a jury and a defendant, makes such dissembling less likely, because it taps into "something deep in human nature" that makes lying about the deeds of another more difficult when said "'to his face' than 'behind his back.'" *Coy* v. *Iowa*, 487 U.S. 1012, 1017-20 (1988); see also *Mattox* v. *United States*, 156 U.S. 237, 242-43 (1895) (observing that "the primary object" of the Confrontation Clause is to afford the "accused . . . an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief"); *Broad. Music, Inc.* v. *Havana Madrid Rest. Corp.*, 175 F.2d 77, 80 (2d Cir. 1949)

("The liar's story may seem uncontradicted to one who merely reads it, yet it may be contradicted . . . by his manner . . . which cold print does not preserve." (internal quotations omitted)) (Frank, J.). As defense lawyers keenly understand, witnesses anticipating possible cross-examination tend to think twice before engaging in overstatement or omission, to avoid being embarrassed or impeached.

Inculpatory written reports, on the other hand, cannot be persuaded to tell the truth. Without the promise that the experts who prepared them will be subject to cross-examination, written statements can easily contain misrepresentations, omissions, fabrications, or mistakes. Indeed, it was the Framers' distrust of written documents—*ex parte* written affidavits in criminal proceedings—that led to the adoption of the Confrontation Clause. See *California* v. *Green*, 399 U.S. 149, 156 (1970) ("[T]he particular vice that gave impetus to the confrontation clause was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining [English] magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.").[2]

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[2] *See also Lilly* v. *Virginia*, 527 U.S. 116, 124 (1999) (plurality opinion) (referring to the "'particular abuse [of] prosecuting a defendant through the presentation of *ex parte* affidavits'"); *White* v. *Illinois*, 502 U.S. 346, 362 (1992) (Thomas, J., concurring) (stating "the primary purpose of the [Confrontation] Clause was to prevent the abuses that had occurred in England"); *Mattox*, 156 U.S. at 242 ("The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . .").

As one prominent Anti-Federalist put it, "'[w]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth.'" *Crawford*, 541 U.S. at 49 (omission and second alteration in original) (quoting R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787)). This historical distrust of *ex parte* written testimony has a practical foundation: An "artful or careless scribe" may "make a witness speak what he never meant." 3 William Blackstone, *Commentaries on the Laws of England* *373 (1768). By contrast, "many times the very Manner of a Witness's delivering his Testimony will give a probable Indication whether he speaks truly or falsely." Mathew Hale, *The History And Analysis of the Common Law of England* 257-58 (1713). These past observations are no less true now in the daily practice of criminal law. Requiring witnesses to physically face a defendant yields far more careful and reliable testimony than the proffer of those merely writing letters to distant courts about faceless defendants.

Despite the patina of reliability that science can sometimes lend them, forensic laboratory reports are as susceptible to unreliability as the *ex parte* affidavits the Confrontation Clause was designed to prohibit. Forensic analysis remains a product of human discretion and judgment that is no less prone to inaccuracy than other forms of evidence. As a practical matter, forensic testing errors can be caused by sample contamination, lack of a proper laboratory protocol or methodology, failure to follow that protocol, lapses in the chain of custody, changes in the science governing the test, or the carelessness of a technician. See *United States* v. *Washington*, 498 F.3d 225, 235 (4th Cir. 2007) (Michael, J., dissenting), *petition for cert. filed*, No. 07-82[illegible] (U.S. Dec. 14, 2007); see

also *United States* v. *Davis*, 14 M.J. 847, 848 n.3 (A.C.M.R. 1982); Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 499-500 (2006) ("Deficient laboratory procedures [and i]nstitutional management failures [by] . . . supervisors, who 'may have ignored or concealed complaints of his misconduct,' produce institutional outcome failures.") (citing *In re Investigation of W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d 501, 504 (W. Va. 1993)).

Moreover, "on rare occasions laboratory technicians have 'engage[d] in long-term systematic, and deliberate falsification of evidence in criminal cases.'" *Washington*, 498 F.3d at 235 (Michael, J., dissenting) (alteration in original) (quoting Metzger, *supra*, at 499); see also *In Re Investigation of W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d at 508 (systemic forensic failures "stain our judicial system and mock the ideal of justice under [the] law"). Indeed, forensic laboratories are not even required to maintain accreditation with a standard-bearing organization, such as the American Society of Crime Laboratory Directors. Here, Petitioner's forensic analysis was *not* performed by an accredited laboratory. Because the forensic analyst who prepared the report was not present for cross-examination, Petitioner could not even inquire about this and other deficiencies.

Without cross-examination, the defense has no opportunity to meaningfully probe the reliability of forensic evidence before the fact-finder. As a result, the prosecution and fact-finder may rely on faulty or inadequately founded conclusions of a forensic analyst. Absent potential cross-examination, the prosecution has less incentive and less expertise to independently probe the scientific bases and methodological underpinnings of forensic conclusions.

Without thorough adversarial testing, these questions and possible errors have little chance of coming to light.

Defense counsel's cross-examination may force a forensic analyst to explain methodology and reveal problems or errors that might otherwise remain undisclosed. *Washington*, 498 F.3d at 235 (Michael, J., dissenting) (noting that the "best way to expose errors or falsification in testing is through cross-examination of the laboratory technician."). A technician may be asked to explain on the record the laboratory protocols for various tests, toward revealing not only any flaws in the routine protocol but a possible failure in its application.

As an illustration, drug weight is typically calculated by including any "mixture or substance" containing a detectible amount of the drug. See *Chapman* v. *United States*, 500 U.S. 453, 461 (1991); cf. United States Sentencing Guidelines Manual § 2D1.1(c), n.A (2008). However, several circuits have since held that materials which must be sorted or eliminated before the drug can be used may not be included in the overall weight measurement. See *United States* v. *Stewart*, 361 F.3d 373, 377-79 (7th Cir. 2004). Thus, for example, excess moisture content of fresh marijuana cannot be included in the weight calculation because that marijuana must be dried prior to use. Accordingly, defense counsel could ask a forensic analyst whether the laboratory accounted for possible excess moisture or whether the sample was dried out to avoid an inflation of drug quantity. See *United States* v. *Campbell*, 295 F.3d 398, 401 (3d Cir. 2002) (observing that, when defense counsel was given opportunity to cross-examine lab chemist, counsel asked whether excess moisture could have affected weight calculation); see also

*Davis*, 14 M.J. at 848 n.3 ("The defense may further wish to ask what other substances were used in the sample and how those would affect a true test reaction.").

More generally, a forensic analyst may be asked to explain those procedures used to avoid mistakes or minimize the margins of error, including whether particular testing procedures are repeated on different equipment. *Id.* (cross-examination "may reveal the possibility of laboratory error due to the carelessness of the chemist sharing a limited area with others and due to the large numbers of samples being tested."). This line of inquiry is particularly critical in those cases where defects in the forensic analysis may be the defendant's only opportunity to demonstrate reasonable doubt as to guilt or to the level of offense.

Cross-examination not only enhances the reliability of evidence through its effect on witnesses, it serves as a critical *ex ante* incentive for the government to carefully vet the cases it seeks to prosecute. Absent cross-examination, prosecutors may rely exclusively on curt or conclusory forensic certificates, or try to prove an essential element of the crime by merely "waving an official-looking paper that says so before the jury." Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington, 15 J.L. & Pol'y 791, 798 (2007). Because forensic analysis is often the pivotal piece of evidence in modern criminal prosecutions, prosecutors anticipating cross-examination of the forensic examiner will look preemptively for weaknesses in their witnesses' testimony. With finite time and resources, prosecutors will be disinclined to spend time on cases with little chance of success owing to unreliable forensic evidence. *Id.* at 801. For this

reason as well, the Confrontation Clause ensures the reliability of evidence at trial.

## II. CROSS-EXAMINATION IS CRITICALLY IMPORTANT FOR THE JURY'S ROLE AS TRIER-OF-FACT.

Viewing live testimony and seeing that testimony tested on cross-examination are critical means by which a jury evaluates the evidence before it. See *Green*, 399 U.S. at 161.

Seeing and hearing *how* a live witness responds to questions is essential to the fact-finding process. Indeed, live observation may sometimes be as important as the answers themselves. Cross-examination may raise and answer questions that the fact-finder might ask herself in her efforts to reconsider and weigh conflicting evidence. As this Court observed with respect to psychiatric experts, the adversary process serves to aid a jury "sort out the reliable from the unreliable evidence." *Barefoot* v. *Estelle*, 463 U.S. 880, 901 (1983), *superseded on other grounds by statute*, Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2253, *as recognized in Slack* v. *McDaniel*, 529 U.S. 473 (2000). This is no less true with forensic laboratory reports. See Merits Br. of Pet'r at 31-33 (discussing error rates and the seventeen different methods of testing substances); see also *Barefoot*, 463 U.S. at 902 ("'[I]t is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's.'"). Indeed, for these reasons, failing to give the fact-finder the opportunity to assess, by face-to-face encounter, a witness's credibility "calls into question the ultimate

integrity of the fact-finding process." *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973) (internal quotations omitted).

The Commonwealth's response—that the fact-finder is "free to disregard the certificates of analysis entirely," Br. in Opp'n at 1—is, practically speaking, no solution at all. This view misapprehends the undeserved authority a jury frequently attaches to a forensic report. "Since laboratory reports only state general conclusions, they may be given far more significance in court than they rightfully deserve." *Davis*, 14 M.J. at 848 n.3.

Indeed, this Court has prohibited the admission of written statements in a joint trial even when the jury was similarly and directly instructed to disregard an accomplice's confession when considering the defendant's guilt. See *Bruton* v. *United States*, 391 U.S. 123 (1968). Regardless of its wording, an instruction is no substitute for live testimony, subject to cross-examination before the jury. Instructing the jury regarding the weight it may give a report does nothing to promote the fact-finder's ability to evaluate the reliability of such evidence, because the very factors upon which reliability is based are absent. *Crawford*, 541 U.S. at 50-52.

* * * * *

Guaranteeing criminal defendants the right to cross-examine forensic examiners would not require that the right be exercised in connection with every use of a laboratory report. Although most defendants would not choose to exercise this right, see *Washington*, 498 F.3d at 235 (Michael, J., dissenting), cross-examination of laboratory technicians would, as in Petitioner's case, provide an essential tool for assessing the reliability of evidence. The mere

prospect and occasional use of cross-examination would improve the reliability of forensic evidence by serving as a prophylactic incentive to forensic analysts and prosecutors alike, and would improve the reliability of forensic evidence. For more than two hundred years, the right to cross-examine has served as an "engine of truth," driving criminal trials towards more accurate results. Given the central role forensic science has come to play in cases like this one, that right must extend to forensic reports.

## CONCLUSION

For the foregoing reasons, as well as those stated in Petitioner's Brief, the judgment below should be reversed.

Respectfully Submitted,

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# AMICUS CURIAE BRIEF

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IN THE

# Supreme Court of the United States

LUIS E. MELENDEZ-DIAZ,
*Petitioner,*
*v.*

COMMONWEALTH OF MASSACHUSETTS,
*Respondent.*

ON WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

## BRIEF OF *AMICI CURIAE* THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND DISTRICT, PROSECUTING, AND COUNTY ATTORNEYS IN SUPPORT OF RESPONDENT

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*Amici curiae* respectfully submit this brief in support of Respondent pursuant to Supreme Court Rule 37.[1] *Amici* urge the Court to affirm the judgment of the Massachusetts Appeals Court.

## INTEREST OF *AMICI CURIAE*[2]

*Amicus curiae* the National District Attorneys Association ("NDAA") is a nonprofit corporation and the sole national membership organization representing local prosecuting attorneys in the United States. Its members come from the offices of District Attorneys, State's Attorneys, Attorneys General and county and city prosecutors with responsibility for prosecuting criminal violations in every state of the United States. Its purposes are to foster and maintain the honor and integrity of the prosecuting attorneys of the United States in both large and small jurisdictions by whatever title such attorneys may be known; to improve and to facilitate the administration of justice in the United States; to promote the study of the law and research therein, the diffusion of knowledge

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[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* has made a monetary contribution to the preparation and submission of this brief. The District Attorney for the Suffolk District was counsel for the Commonwealth of Massachusetts in the state trial and appellate courts, but is not counsel for any party before this Court.

[2] All parties have consented to the filing of this *amici curiae* brief. Pursuant to Supreme Court Rule 37, a timely letter of consent from Respondent accompanies this filing. *Amici curiae* further rely upon Petitioner's letter of general consent on file with the Court.

thereof and the continuing education of prosecuting attorneys, lawyers, law enforcement personnel, and other members of the interested public by various means including, but not limited to, arranging seminars and fostering periodic conventions or meetings for the discussion and solution of legal problems affecting the public interest in the administration of justice; and to cause to be published and to distribute addresses, reports, treatises, and other literary works on legal subjects or other related subjects. The NDAA was formed in 1950 by local prosecutors to give a focal point to advancing their causes and issues at the national level. NDAA representatives regularly meet with the Department of Justice, members of Congress and other national associations to represent the views of prosecutors to influence federal and national policies and programs which impact law enforcement and prosecution. Since its formation, the NDAA's programs of education and training, publications and amicus curiae activity have carried out its guiding purpose of serving as "the Voice of America's Prosecutors and To Support Their Efforts to Protect the Rights and Safety of the People." As such, the NDAA is qualified to offer assistance to this Court in this matter.

*Amicus curiae* the District Attorney for the Suffolk District, Boston, Massachusetts, is charged by statute and the Massachusetts Constitution with enforcing the criminal laws of the Commonwealth, pursuing justice in all cases under his oversight, and in protecting the rights of the victims of crime. The District Attorney for the Suffolk District is the largest and busiest district attorney's office in the Commonwealth of Massachusetts. The District Attorney has appointed

approximately 140 Assistant District Attorneys. In 2007, Assistant District Attorneys in the Suffolk District prosecuted approximately 11,000 matters involving the distribution and possession of controlled substances at the trial and appellate levels. Crime prevention, public safety, and the swift investigation and prosecution of violent crimes, many of which are related to drug offenses, are priorities of the District Attorney. Drug abuse and trafficking is a persistent plight in the Suffolk District and vigorous prosecution of these offenses is one of the highest priorities for the District Attorney. In response to the numerous narcotic offenses prosecuted in the Suffolk District, the office has established three drug courts. Thus, the District Attorney for the Suffolk District is qualified to assist the Court in assessing the undue burden on the states resulting from an adverse holding by this Court and to assist it in determining whether drug analysis certificates are "testimonial" evidence subject to the mandates of the confrontation clause.

*Amicus curiae* the Prosecuting Attorney for Cuyahoga County, Cleveland, Ohio, is charged with enforcing the criminal laws of the State of Ohio. The Cuyahoga County Prosecutor's Office is the largest and busiest prosecutor's office in the State of Ohio and has approximately 204 Assistant Prosecuting Attorneys. In 2007, the Major Drug Offenders Unit and the General Felony Unit in the Prosecuting Attorney's Office prosecuted approximately 14,000 matters in violation of the Ohio narcotics statute, O.R.C. 2925, *et seq.* The Cuyahoga County Prosecutor's Office also provides legal counsel and support to local, state, and federal law enforcement agencies in the investigation and prosecution of individuals traf-

ficking and possessing illegal drugs. Therefore, the Prosecuting Attorney for Cuyahoga County is qualified to assist the Court in assessing the undue burden on the states should the Court determine that live testimony by a drug analyst is required in each and every narcotics case.

*Amicus curiae* the Prosecuting Attorney for the County of Wayne, Detroit, Michigan, is charged by state statutes and the Michigan Constitution with the responsibility of litigating all criminal prosecutions within Wayne County and has a vital interest in the outcome of all criminal litigation. Wayne County is the largest county in the State of Michigan and the Prosecuting Attorney's Office of Wayne County is among the largest and busiest in the United States. The Prosecuting Attorney for the County of Wayne has appointed approximately 150 Assistant Prosecuting Attorneys in non-supervisory positions. In 2007, Assistant Prosecuting Attorneys prosecuted 64% of all serious felony jury trials, 56% of all lesser felony jury trials, and 52% of all felony matters in the State of Michigan. In 2007, 6,200 cases were initiated by the Prosecuting Attorney's Office for violation of controlled substance prohibitions. These cases are distributed throughout the trial staff, except for what are deemed "major" controlled substance offenses. A special unit attempts to prosecute many of these offenses and is staffed by four attorneys. This unit prosecuted over 250 major drug cases in 2007. Therefore, the Prosecuting Attorney for the County of Wayne is qualified to assist the Court in considering the undue burden on the states should the Court determine that *Crawford* applies to drug analysis certificates.

*Amicus curiae* the District Attorney for the City of Philadelphia, Pennsylvania, prosecutes the greatest number of drug cases in the Commonwealth of Pennsylvania. The District Attorney's Office has approximately 300 Assistant District Attorneys and is the largest appellate litigator in the Commonwealth of Pennsylvania. In 2007, the District Attorney's Office prosecuted approximately 25,000 various narcotics cases. In the City of Philadelphia, the trafficking of illegal drugs is often at the root of violent crimes including murder and robbery. Victims of drug-related gun violence often include innocent children caught in the crossfire. Prosecuting drug offenses is therefore essential to the protection of the public and is among the highest priorities of the District Attorney. As such, the District Attorney for the City of Philadelphia is qualified to assist the Court in considering the importance of the efficient and effective prosecution of drug violations and the undue burden on the states should the Court hold that live testimony by a drug analyst is required in every narcotics case.

*Amicus curiae* the District Attorney for the 10th Judicial Circuit, Birmingham, Alabama, is charged with enforcing the criminal laws in the State of Alabama. The District Attorney for the 10th Judicial Circuit has under his employment approximately 43 Assistant District Attorneys. In 2007, the District Attorney's Office prosecuted hundreds of drug related offenses. As such, the District Attorney for the 10th Judicial Circuit is qualified to offer assistance to this Court in assessing the undue burden on the states should live testimony be required in each and every matter related to a controlled substance violation.

*Amicus curiae* the District Attorney for Clark County, Las Vegas, Nevada, is charged by statute and the Nevada Constitution with prosecuting all felony and gross misdemeanor crimes occurring anywhere within the county and all misdemeanors occurring within the unincorporated parts of the county. Clark County, Nevada, is the fifteenth largest county in the nation and the most populous of the seventeen counties in Nevada. The Clark County District Attorney's Office is the busiest and largest prosecutor's office in the state. There are approximately 161 Deputy District Attorneys appearing regularly in 50 judicial forums. In 2007, the District Attorney prosecuted over 60,000 criminal cases, including numerous controlled substances related matters. Therefore, the District Attorney for Clark County is qualified to offer assistance to this Court in this matter.

*Amicus curiae* the County Attorney for Maricopa County, Phoenix, Arizona, is charged by statute and the Arizona Constitution with prosecuting all felonies that occur in Maricopa County and all misdemeanors that occur in unincorporated areas. The Maricopa County Attorney's Office is the largest and busiest prosecutor's office in Arizona. The County Attorney's Office has fifteen specialized bureaus and 257 Assistant County Attorneys. In 2007, the Maricopa County Attorney's Office prosecuted nearly 18,000 drug related offenses. In Maricopa County, drug offenses are often times related to violent crimes and gang activities. The successful and vigorous prosecution of drug offenses, and treatment of first and second time nonviolent offenders, is therefore essential to the quality of community life and a priority in the Maricopa County Attorney's Office. Therefore, the Maricopa County Attorney is qualified to assist

the Court in considering the undue burden on the states should it determine that *Crawford* applies to drug analysis certificates.

*Amicus curiae* the Prosecuting Attorney for St. Louis County, Clayton, Missouri, is charged by statute and the Missouri Constitution with enforcing the criminal laws of Missouri. St. Louis County is the most populous county and has the highest crime rates in Missouri. There are currently 54 Assistant Prosecuting Attorneys for St. Louis County. In 2007, the Prosecuting Attorney prosecuted over a thousand drug related felonies. The Gang/Drug Division monitors gang and drug activities in the St. Louis metropolitan area and participates in the activities of the St. Louis County Gang Task Force. This task force is comprised of representatives of various law enforcement agencies, local school districts, and other agencies concerned about the problems created by criminal street gangs. As such, the Prosecuting Attorney for St. Louis County is qualified to assist this Court in considering the undue burden on the states should it hold that live testimony by a drug analyst is required in every narcotics related case.

*Amicus curiae* the District Attorney General for the 30th Judicial District, Shelby County, Memphis, Tennessee, is charged by statute and the Tennessee Constitution with enforcing the state drug laws in the State of Tennessee. The District Attorney General has appointed approximately 103 Assistant District Attorneys. Shelby County has the highest number of crimes, including drug related offenses, and is the largest county in the State of Tennessee. In 2007, Shelby County was plagued with the continued combination of gangs, guns, and drugs. As such, the Dis-

trict Attorney General's office prosecuted 16,427 drug offenses and an estimated 5,000 drug related matters in 2007. Therefore, the District Attorney General for the 30th Judicial District, Shelby County, is qualified to assist the Court in considering the undue burden on the states should it hold that drug analysis certificates implicate the confrontation clause.

## SUMMARY OF ARGUMENT

*Amici* suggest that holding drug analysis certificates to be testimonial would be contrary to the law of evidence regarding the admissibility of public records as it existed at, and has been applied since, the adoption of the confrontation clause. Applying the holding of *Crawford* to drug analysis certificates which are prepared pursuant to statutory directive, and are rendered self-authenticating as public records by statute, would be an unprecedented and unnecessary expansion of *Crawford* and of the right to confrontation. Such a modification of the law would impose an undue burden upon the states in enforcing the drug laws in our respective jurisdictions, where tens of thousands of narcotic cases are prosecuted annually. Requiring live testimony for the admission of drug analysis certificates in each and every case would overwhelm the existing judicial, prosecutorial and administrative resources and would bring effective prosecution of narcotics cases to a standstill.

Furthermore, historical records, which demonstrate that the confrontation clause is not offended by the introduction in evidence of self-authenticating government documents or public

records, support the conclusion that drug analysis certificates are admissible without violating the confrontation clause. Historically, many government documents, including court records, and birth and marriage certificates, were not deemed testimonial and were never intended to be encompassed by the confrontation clause. These records are admissible without the testimony of their maker as a foundation for the introduction of the record, largely because the maker or keeper of the record will likely not remember the specific events or observations surrounding its creation, thus stripping cross-examination of any useful purpose. In addition, although such documents are probative of some of the facts required for conviction, they are not alone sufficient to convict, and the right to confront the critical witnesses who establish that defendant possessed the substance about which the record has been made is preserved.

## ARGUMENT

**REQUIRING TESTIMONY FROM DRUG ANALYSTS WOULD IMPOSE AN UNDUE BURDEN UPON THE STATES AND HAVE CRIPPLING CONSEQUENCES FOR THE EFFECTIVE AND EFFICIENT PROSCECUTION OF DRUG CASES IN THE STATE TRIAL COURTS.**

### A. Significant Delay In The Administration Of Justice Will Occur If Live Testimony By A Laboratory Analyst Is Required In Every Narcotics Case.

It would be difficult for states to comply with a holding that *Crawford v. Washington*, 541 U.S. 36 (2004), applies to drug analysis certificates, and that such certificates are no longer admissible as self-authenticating public records. Compliance with such a holding would require that the foundation for the admission of such a certificate be laid through the testimony of the laboratory chemist who tested the substance and made the record certifying the result of the test in each particular case. This would adversely affect the orderly and efficient administration of justice in all respects. Given the number of tests performed and certificates prepared by each analyst in a given year, the appearance at trial of the chemist who performed the test in each case would be physically impossible.

The Massachusetts laws at issue in this case, Mass. G.L. c. 22C, § 39 and G.L. c. 111, § 13, currently provide that certificates of analy-

sis, prepared by the designated laboratories at the department of public health, the University of Massachusetts medical school, and the Massachusetts State Police, may, if properly executed, be admitted as prima facie evidence of the composition, quality, and weight of a controlled substance.

The amount of narcotics recovered by law enforcement officers, tested by drug analysts, and subsequently prosecuted by the states is astounding, particularly in large and busy jurisdictions. In 2007, *amicus curiae* the District Attorney for the Suffolk District, Boston, Massachusetts, prosecuted a total of 10,259 narcotics cases in the Commonwealth's district, municipal, and Superior Courts. In fiscal year 2006, 8,665 narcotics related charges were issued in the eight divisions of the Boston Municipal Court.[3] In fiscal year 2007, 1,041 narcotics related charges were issued in the Chelsea District Court alone.[4] The number of charges does not reflect the amount of drugs seized, as there is a high likelihood that multiple charges are issued in any given case. Some cases involve possession or distribution of multiple types of drugs. *See* Mass. G.L. c. 94C, §§ 1, *et seq*. Overall, these numbers reflect an

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[3] *See* Massachusetts Court System, Boston Municipal Court http://www.mass.gov/courts/courtsandjudges/courts/bostonmunicipalcourt/2006stats html (follow to "Caseload Statistics" PDF Report).

[4] *See* Massachusetts Court System, Boston Municipal Court, http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/crimstats2007.pdf. The Chelsea District Court is one of nine district and municipal courts within the Suffolk District.

enormous volume of drug cases handled in the district and municipal courts in the Suffolk District.[5]

Similarly, other *amici* prosecuted an overwhelming amount of drug related cases in 2007, indicative of the incredible volume of drug matters that exist in the state trial courts. The District Attorney's Office for the City of Philadelphia, for example, prosecuted approximately 25,000 narcotics related matters in 2007. Likewise, *amicus curiae* the Prosecuting Attorney's Office for Wayne County, Detroit, Michigan, prosecuted 6,200 controlled substances violations. *Amici* the District Attorney General's Office for Shelby County, Memphis, Tennessee, prosecuted nearly 22,000 drug matters, and the Prosecuting Attorney's Office, Cuyahoga County, Cleveland, Ohio handled approximately 14,000 narcotic violations. *Amicus curiae* the Maricopa County District Attorney's Office, Phoenix, Arizona, prosecuted nearly 18,000 drug related cases in 2007.

In addition, many of the forensic laboratories throughout the country, which conduct substance analyses, are significantly understaffed. The narcotics recovered in the City of Philadelphia, for example, are tested by the Crime Laboratory of the Philadelphia Police Department ("Crime Lab"). In 2007, the Crime Lab's 18 ana-

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[5] The number of narcotics related charges issued in the District Court Departments of the Commonwealth of Massachusetts totaled 46,685 in 2007. *See* http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/crimstats2007.pdf. Of those 46,685 narcotics cases, which involved adult offenders, 8,665 were prosecuted in the Boston Municipal Court. A total of 5,917 narcotics cases were filed in the Massachusetts Superior Court Department.

lysts processed approximately 28,000 various types of narcotics. Given these figures and the possibility that live testimony is required for every case involving a drug analysis certificate, each drug analyst in Philadelphia would be expected to testify in approximately 1,389 cases *per annum* in the various trial courts of the City of Philadelphia.

Likewise, controlled substances recovered in Cuyahoga County, Cleveland, Ohio, are tested by either the Bureau of Criminal Investigation and Identification of the Ohio Attorney General's Office ("BCI") or the Scientific Investigation Unit of the Cleveland Police Department ("SIU"). Analysts in the Chemistry Unit at BCI examine a variety of narcotics, including marijuana, heroin, cocaine, amphetamines, barbiturates, LSD, PCP, and others. Ninety percent of the caseload in the Chemistry Unit involves drug analysis.[6] BCI employs fourteen full time chemists, who in 2007 analyzed a total of 14,039 cases. Moreover, SIU received 13,668 cases and analyzed 10,474 in 2007.[7] For this volume of drug analyses, SIU employs four full time and two part time analysts. As is the case throughout the nation, a case submitted to SIU for analysis often contains numerous items, but results in only one laboratory report. Therefore, the number of drugs actually tested by the analysts is much higher than the number of cases received by SIU.

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[6] *See* http://www.ag.state.oh.us/le/investigation/lab.asp.

[7] Given its limited resources, SIU does not test marijuana in misdemeanor cases, unless it is needed for trial. In addition, SIU does not test narcotics that were "property found" and are attributed to unknown suspects.

Illegal narcotics recovered in Clark County, Nevada, are analyzed in the Las Vegas Metropolitan Police Department Forensic Laboratory, which is one of two full service forensic laboratories in Nevada, and conducts all controlled substance analyses for the southern half of the state. In 2007, the laboratory received 2,205 requests for the analysis of controlled substances. It had four full time scientists who performed analyses on 2,251 cases, often involving more than one item to be analyzed. Due to the increased popularity of methamphetamines in the southwestern areas of the United States, in the first eight months of 2008, the lab has already received 2,973 requests, almost double the amount of last year, and, so far, 4.5 full time analysts have performed analyses on 1,721 cases, again often involving multiple items.

Furthermore, in Massachusetts, all drugs recovered in the Suffolk District are tested, analyzed, and certified by either the Forensic Services Group, Crime Laboratory System, Drug Unit of the Massachusetts State Police ("Drug Unit")[8] or the Massachusetts Department of Public Health ("DPH") laboratories. Mass. G.L. c. 22C, § 39 and G.L. c. 111, § 13. These laboratories are significantly understaffed with drug analysts. There are currently only eight analysts in the Drug Unit and 15 chemists at DPH. In 2007, the Drug Unit received about 8,000 cases for testing, and DPH analyzed 42,583 items, and multiple tests were

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[8] Pursuant to Mass. G.L. c. 6A, § 18 *et seq.*, the Massachusetts State Police is declared to be within the executive office of public safety and does not answer directly to the state prosecutors.

performed on each item.[9] Currently, it takes the laboratory analysts at both the Drug Unit and DPH approximately four months to issue a certificate of drug analysis after the drugs have been seized.

Given the limited resources in the state laboratories, requiring live testimony in each and every drug-related case would cause significant delays in the administration of justice at every level in the *amici* jurisdictions. First, significant delays will occur in the trial courts. The trial courts in the *amici* jurisdictions all carry a tremendous docket. In order to ensure the orderly and efficient administration of justice, in courtrooms throughout the country, more cases are scheduled for trial each day than can be tried because often a case scheduled for trial will not proceed for various reasons. Another case may be given priority because the defendant is in custody, because there are civilian witnesses who are unavailable to testify on another day, or because the case is older in time. Yet another case may plea immediately before trial, and another case is then called for trial, making it impossible to predict which cases will actually be heard on the day they are scheduled. If a case does not proceed to trial, it will be rescheduled, often as many as four

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[9] 1,598 of the 42,583 items analyzed by DPH were determined not to be a controlled substance. Further, the Drugs of Abuse Laboratory ("DAL"), located at the University of Massachusetts Medical Center in Worcester, analyzes samples brought to it by police departments in Worcester County, Massachusetts. In 2006 and 2007, DAL analyzed 11,586 cases. Of those cases, approximately 4 percent were reported as negative or no controlled substances detected. In addition 15 percent in 2006 and 12% in 2007 were not tested for various reasons.

additional times. If an analyst had to testify in every narcotics case, he would have to appear and needlessly wait several hours whenever a narcotics case is scheduled, to see if the case really proceeds to trial. If it does not, the analyst will have to return to court as many as four times for just one case.

Second, if this Court required analysts to testify at each and every drug trial, significant delays would occur in the testing of controlled substances. It would be terribly difficult, if not impossible, for scientific laboratory personnel to complete their tasks while also regularly appearing in court to testify. These appearances by drug analysts would significantly curtail the amount of time available for analyzing drugs, issuing certificates of drug analysis, and complying with discovery orders to produce those certificates.

Third, applying *Crawford* to drug analysis certificates could conflict with a defendant's right to a speedy trial. Because of the sheer volume of drug cases they analyze, chemists would likely be required to appear in multiple courts in different cities or counties at the same time, and it would be impossible for multiple judges to coordinate trials between courts with the same witness. As a result, trials would be further delayed to accommodate the analysts' schedules, conflicting with efficient case management and the guidelines and time standards set forth by the courts in which a defendant must be brought to trial. Ultimately, the defendant could be denied his right to a speedy trial. *See* Mass. R. Crim. P. 36; Mich. R. Crim. P. 6.004; Pa. R. Crim. P. 600; Ohio Rev. Code Ann. § 2945.71 *et seq.*, Mo. Rev. Stat. § 217.450 *et. seq.* Requiring an analyst to testify at every

narcotics trial would effectively trump all other priorities balanced by the courts.

Ultimately, however, the requirement that an analyst appear and testify at every trial would essentially nullify the drug violation laws and compromise public safety. If a defendant's right to a speedy trial is violated, he is entitled to dismissal of the charges with prejudice. *See* Mass. R. Crim. P. 36; Mich. R. Crim. P. 6.004; Pa. R. Crim. P. 600; Ohio Rev. Code Ann. §§ 2945.71 *et seq.*, Mo. Rev. Stat. §§ 217.450 *et seq.*, § 554.780, Nev. Rev. Stat. Ann. § 178.556, Ariz. Rev. Stat. Ann. § 13-114. If, therefore, a drug analyst cannot appear for trial, a judge would have the discretion to dismiss the case. *See* Mass. R. Crim. P. 36(c); Ohio R. Crim. P. 48(B); Mich. R. Crim. P. 6.004; Pa. R. Crim. P. 600, Nev. Rev. Stat. Ann. § 178.556, Ariz. R. Crim. P. 8. This result will be particularly likely if the case has been previously continued for trial. After a case has been dismissed, a prosecutor could then file charges anew or file a motion to reconsider the dismissal. If the case were revived, another trial date would have to be scheduled, adding months of delay to the resolution of drug cases. Furthermore, this consequence would nullify the anti-drug laws that *amici* have been specifically charged to enforce. The duties of law enforcement officers would similarly be thwarted since arrests for drug violations would likely not result in successful prosecutions.

As another palpable consequence of requiring live testimony by analysts, the number of guilty pleas in narcotics cases will decrease significantly. *Amici* law professors' assessment that the effect of live testimony on the prosecution of narcotics cases would be slim is false. *See* Br. of Law Professors as *Amici Curiae* in Supp. of Pet'r, at 7-

9. As *amici* law professors correctly note, about 95% of felony cases in the state courts are currently resolved by way of plea agreements. *See id.*; Bureau of Justice Statistics, Dep't of Justice, Felony Sentences in State Courts, 2004, at 1-2 (2007).[10] In 2004, drug offenses (i.e. possession and trafficking) resulted in 34% of all felony convictions in the state courts, amounting to about 362,850 convictions. Bureau of Justice Statistics, Dep't of Justice, Felony Sentences in State Courts, 2004, at 2 (2007). Drug offenses by far outnumbered violent offenses (18%) and property offenses, including burglary, larceny, and fraud/forgery (29%). *Id.*[11] In comparison, rape and sexual assault cases, in which expert witnesses or DNA analysts are frequently required to testify, make up only about 3% percent of all felony cases. *Id.*

Based on the above-mentioned statistics, it is likely that currently also about 95% of all drug cases are resolved via guilty plea. *See* Bureau of Justice Statistics, Dep't of Justice, Felony Sentences in State Courts, 2004, at 1-2 (2007). Pleas in drug prosecutions thus lead to about 32.3% percent, or roughly 344,707 of all felony convictions in U.S. state courts. Because insufficient numbers of analysts will be available to testify, the number of guilty pleas in felony cases in the

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[10] Of all felony convictions in the United States, 94% are obtained in state courts, and the remaining 6% in federal courts. Bureau of Justice Statistics, Dep't of Justice, Felony Sentences in State Courts, 2004, at 1-2 (2007).

[11] Likewise, in the federal courts, drug offenses making up 37% of all convictions, by far outnumbered all other categories of crimes. Bureau of Justice Statistics, Dep't of Justice, Felony Sentences in State Courts, 2004, at 2 (2007).

state courts will thus decrease by about one third. As a consequence, court systems throughout the country will be significantly affected and overburdened. Alternatively, in order to obtain any convictions at all in narcotics cases, the prosecution may be forced to agree to lenient plea agreements, creating an undeserved windfall for many defendants.

If live testimony of an analyst were required in each and every drug case, the current criminal justice system would effectively come to a standstill. Knowing that the prosecution could only prove its case if an analyst is present to testify, no defendant would agree to plead guilty, unless the analyst were already present in the courtroom. In fact, any defense attorney who were to advise his or her client to plead guilty in a case where it is not certain that the prosecution can proceed for want of an analyst, would likely be subject to a claim of ineffective assistance of counsel. Because of the current staffing levels and budgetary restrictions in states throughout the country, it will be highly unlikely that an analyst will in fact be available to testify in every narcotics case. The Massachusetts State Police Drug Unit has estimated, for example, that with their current volume of cases and staffing level, requiring an analyst to testify in court in only 30% of cases would decrease the Drug Unit's productivity by 100%, making it impossible to analyze any more cases. As a result, it is highly unlikely that an analyst will be available to testify in any but the most serious narcotics cases.

### B. The Scheme Advanced By The Petitioner Would Increase The Already Staggering Costs Illegal Drugs Inflict On Our Communities.

The American people have expressed a significant interest in curtailing the availability and dissemination of illegal drugs. This is reflected in the introduction to the "Controlled Substances Act," 21 U.S.C. §§ 801, *et seq.*, where the Congress declared that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2). Society's desire to harshly punish the manufacturing, possession, and distribution of illegal narcotics is likewise reflected in the punishment structure for these offenses at the federal level. *See* 21 U.S.C. § 841(a)-(b). Between 1985 and 2001 "drugs" was consistently one of the top ten answers given by Americans when asked what they thought was the most important problem facing the nation.[12]

Illicit narcotics use is a widespread problem in U.S. society. In 2006, an estimated 20.4 million Americans, or 8.3% of the population aged 12 years old or older, reported being current illicit drug users. *Results from the 2006 National Sur-*

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[12] Jonathan P. Caulkins, Peter Reuter, Martin Y. Iguchi, & James Chiesa, *How Goes the "War on Drugs"?: An Assessment of U.S. Drugs Programs and Policy*, RAND DRUG POLICY RESEARCH CENTER (2005), at 1, available at: http://www.rand.org/pubs/occasional_papers/2005/RAND_op121.pdf.

*vey on Drug Use and Health: National Findings.* Department of Health and Human Services (2007), at 16. While marijuana was the most prevalent drug, in 2006, there were approximately 2.4 million cocaine users, about 702,000 of whom used crack cocaine. *Id.* In addition, in 2006, 10.2 million persons, or 4.2% of the population aged 12 years old or older reported having driven under the influence of illicit drugs during the past year. *Results from the 2006 National Survey on Drug Use and Health: National Findings,* Department of Health and Human Services (2007) at 29.

Illicit narcotics use thus comes at a huge annual cost to our communities. The National Drug Intelligence Center reported that, according to the Office of National Drug Control Policy ("ONDCP"), the economic cost of drug abuse to the United States in 2002 amounted to $180.9 billion.[13] These staggering economic consequences severely curtail federal, state, and local governmental resources, and, ultimately, those of the taxpayer. *Id.* It has been estimated that in 1999, Americans spent $36 billion on cocaine, $11 on heroin, $10 billion on marijuana, $5.8 billion on methamphetamines, and $2.6 billion on all other illegal drugs combined.[14] This $65.4 bil-

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[13] *See* National Drug Threat Assessment 2006, *The Impact of Drugs on Society,* NATIONAL DRUG INTELLIGENCE CENTER (2006), available at:
http://www.usdoj.gov/ndic/pubs11/18862/impact.htm;
*Economic Costs of Drug Abuse in the U.S. 1992-2002,* Executive Summary, ONDCP at vi.

[14] Jonathan P. Caulkins et al., *How Goes the "War on Drugs"?: An Assessment of U.S. Drugs Programs and Policy,* RAND DRUG POLICY RESEARCH CENTER (2005), at 7.

tion is being withheld from the lawful economy of the United States.

Furthermore, in 2002, the healthcare related costs of illicit drug use amount to roughly $16 billion. *Economic Costs of Drug Abuse in the U.S. 1992-2002*, Executive Summary, ONDCP, at ix. According to the Substance Abuse and Mental Health Services Administration ("SAMHSA"), in 2003, 627,923 drug-related visits to hospital emergency rooms occurred nationwide.[15] Of these visits, cocaine alone was responsible for 20%, or 125,921, while marijuana was involved in 79,663 or 13%, and heroin in 47,604 or about 8% of all drug-related emergency room visits. *Id.*

The amount of healthcare related costs generated by drug abuse in the United States makes it "one of the most costly health problems in the United States." *Id.* at xiii. According to reports created by the National Institutes of Health (NIH), the health-related costs associated with drug abuse ($124.9 billion in 1995) are comparable to those generated by other major health problems in the United States, such as heart disease ($183.1 billion in 1999), cancer ($96.1 billion in 1990), diabetes ($98.2 billion in 1997), Alzheimer's disease ($100 billion in 1997), stroke ($43.3 billion in 1998), smoking ($138 billion in 1995), obesity ($99.2 billion in 1995), alcohol abuse ($184.6 billion in 1998) and mental illness ($160.8 billion in 1992). *Id.*

The listed consequences are but a few of those society faces from widespread and uncontrolled use of illicit drugs. Other consequences

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[15] *See* National Institute on Drug Abuse, *NIDA Info Facts, Hospital Visits*, available at: http://www.drugabuse.gov/infofacts/HospitalVisits.html.

include the spread of HIV/AIDS and the reduced survival rate of those individuals who contract it through use of infected injection needles, or the fact that children of individuals who abuse drugs are often exposed to drugs themselves, or they are abused and neglected as a consequence of the parent's illicit drug use.[16]

While in 2006 the rate of drug use among adults aged 18 years old or older was higher for unemployed persons (18.5%) than for those employed full time (8.8%) or part-time (9.4), most illicit drug users were employed. *Results from the 2006 National Survey on Drug Use and Health: National Findings,* Department of Health and Human Services (2007) at 27. Illicit drug use on the job carries with it significant dangers and consequences, including higher rates of accidents and insurance claims, increased absenteeism and lost productivity.[17] Lost productivity, in fact, in 2002 amounted to about 71.2% of the annual cost of illicit drug abuse, or approximately $127.8 billion. *Economic Costs of Drug Abuse in the U.S. 1992-2002*, Executive Summary, ONDCP at vii-viii & Fig.2. Drug abuse and dependence further "reduce the capacity of individuals to work produc-

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[16] *See* National Drug Threat Assessment 2006, *The Impact of Drugs on Society*, NATIONAL DRUG INTELLIGENCE CENTER (2006), available at:
http://www.usdoj.gov/ndic/pubs11/18862/impact.htm.

[17] *See* National Drug Threat Assessment 2006, *The Impact of Drugs on Society*, NATIONAL DRUG INTELLIGENCE CENTER (2006), available at:
http://www.usdoj.gov/ndic/pubs11/18862/impact.htm;
Robert Kaestner & Michael Grossman, *The Effect of Drug Use on Workplace Accidents*, 5 LABOUR ECONOMICS (3), 267-94 (Sept. 1998).

tively in their workplaces and homes. The shortfall in wages and employment among drug users has been estimated at US$24.9 billion." William S. Cartwright, *Economic costs of drug abuse: Financial, cost of illness, and services*, 34 JOURNAL OF SUBSTANCE ABUSE TREATMENT (2), 224-33 (March 2008).

This Court has long recognized the dangers of illicit drug use in the work place. "An idle locomotive, sitting in the round-house, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 628 (1989) (quoting *Railway Labor Executives Ass'n v. Burnley*, 839 F.2d 575, 593 (9th Cir. 1988)). As a result, the Court endorsed drug testing to further the governmental interest of deterring illicit drug use by engineers and trainmen in *Skinner*. *Id.*

The Court has further acknowledged the detrimental effect of illegal narcotics on society in the context of permitting drug testing in public schools for participants in extracurricular activities. *See Board of Educ. v. Earls*, 536 U.S. 822, 839-840 (2002) (Breyer, J. concurring) ("[T]he drug problem in our Nation's schools is serious in terms of size, the kinds of drugs used, and the consequences of that use both for our children and the rest of us."); *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995) ("Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs.").

In addition to the economic and social consequences, illicit drug use has a direct effect on the amount of crime in the United States. On the

one hand are "drug specific" crimes "such as sales, manufacturing and possession of illicit drugs," responsible for incarceration of about 330,000 persons in 2002. *Economic Costs of Drug Abuse in the U.S. 1992-2002*, Executive Summary, ONDCP at xi. On the other hand are income generating crimes, such as larceny and burglary, one quarter to one third of which can be attributed to drug dependent individuals who commit them "in order to finance expensive drug addictions." *Id.* at xi-xii. In 2002, these crimes resulted in another 135,000 incarcerations. *Id.* at xi.

The numbers of incarcerations for drug specific and income generating crimes indicate that law enforcement plays a significant role in combating the sale and distribution of illegal narcotics as well as its collateral consequences. Specifically, in the jurisdictions of *amici* alone, more than 91,627 prosecutions for the possession, possession with intent to distribute, distribution, and trafficking in illegal narcotics were initiated in 2007. *See* Statements of Interest of *Amici Curiae*, *supra* at 1-8. On the federal level, law enforcement officers over the past five years, have seized 476 tons of cocaine, 3.5 tons of heroin, and 1,192 tons of marijuana.[18] In 2007 alone, 96.7 tons of cocaine, 0.6 tons of heroin, and 356 tons of marijuana were seized.[19] These drugs would otherwise be sold and used in the United States. Because many street level drug dealers are themselves heavy users, their arrests can also result in court-ordered drug treatment and a chance to

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[18] http://www.usdoj.gov/dea/statistics.html#seizures.

[19] *Id.*

"break free from drug addiction." 2008 NAT. DRUG CONTROL STRATEGY ANN. REP., at 39. Law enforcement agencies throughout the United States, including *amici* and the police departments with whom they cooperate, therefore, fulfill their statutory and constitutional duties, which charge them with enforcing the criminal laws in their respective jurisdictions and with pursuing justice in all cases under their oversight. Statements of Interest of *Amici Curiae*, *supra* at 1-8.

Recent data indicate that the efforts of law enforcement have a direct and palpable effect on the availability of drugs on the streets of the United States. *See, e.g.*, 2008 NAT. DRUG CONTROL STRATEGY ANN. REP., at 35 ("when domestic law enforcement efforts dismantled the world's largest LSD production organization in 2000, the reported rate of past-year LSD use by young people plummeted – a drop of over two-thirds from 2002 to 2006"). From January to September 2007, "domestic and international law enforcement efforts have combined to yield a historic cocaine shortage on U.S. streets," including in most of the jurisdictions represented by *amici* (Cleveland, Detroit, Memphis, St. Louis, Philadelphia, Boston, and Phoenix). 2008 NAT. DRUG CONTROL STRATEGY ANN. REP., at 35 & Fig. 16. This shortage, in turn, had a direct effect on society by sharply increasing the purchase price of cocaine, and by decreasing the number of positive workplace drug tests and emergency room admissions for cocaine in 2007. *Id.* at 35-36.

Under the scheme which Petitioner desires, the police and other law enforcement agencies would still be able to seize narcotics in the same fashion they currently do. Without any thrust of effective law enforcement behinds their efforts,

they would be degraded, however, to mere collection agencies, their Stygian stable clearing converted to a Sisyphean task. Street level drug dealers and low-level distributors, on the other hand, would be able to operate with the assurance that they will rarely have to face the consequences of their actions. While some positive results may be felt for some time, generally, "prohibition without enforcement invites greater drug use and harmful consequences."[20] Under the system advocated by the Petitioner, the current practice of narcotics prosecutions, already strained logistically and financially, will face an insurmountable hurdle and come to a halt. The great cost to our communities will become painfully obvious and is sadly unnecessary.

The difficulties our communities face in enforcing the drug laws are well-chronicled. Petitioner seeks the addition of another one by advocating for an incidental benefit for a defendant in the form of live testimony by a drug analyst or chemist who, because of his or her tremendous work load and the routine nature of the tests performed, will not be able to remember the individual case. This Court has said before that this is not what the confrontation clause seeks to protect. "The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Mattox v. United States*, 156 U.S. 237, 243 (1895).

The courts have indeed long recognized this problem and have adjusted the confrontation re-

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[20] Jonathan P. Caulkins et al., *How Goes the "War on Drugs"?: An Assessment of U.S. Drugs Programs and Policy*, RAND DRUG POLICY RESEARCH CENTER (2005), at 37.

quirements accordingly. Indeed, within this context, the Framers intended flexibility and did not seek to sacrifice the interests of many in order to preserve incidental benefits for a few.

### C. A Brief Historical Perspective

In *Crawford*, this Court reaffirmed that the confrontation clause should be understood and applied as it was at the time the Constitution was adopted. *Crawford*, 541 U.S. at 43. In so doing, this Court recognized that certain exceptions to the hearsay rule did not violate the confrontation clause. *Id.* at 43-50. Nearly two centuries later, this Court is asked to ascertain whether that clause bars the admission of a certificate that sets forth the result of certain empirical tests, namely, the weight and character of a substance. *See* Mass. G.L. c. 111, § 13.

The Petitioner asserts that this statute and similar statutes that permit the use of a chemist's certificate as evidence without the need for the chemist's live testimony was the result of this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980). Br. of Pet'r, p. 3. To give but one example, Petitioner's claim has no historical support in the statutory laws of the Commonwealth of Massachusetts, which have mandated the analyses of alcohol and controlled substances, and have permitted their introduction without live witnesses, since 1875 and 1910, respectively. *See* St. 1875, c. 99, § 21 (analysis in conjunction with licensing boards assuring quality of liquors); St. 1882, c. 221, §§ 55, 56, 57, 58 (use of certificates of analysis of alcohol in forfeiture proceedings); St. 1910, c. 495, §§ 1-3 (testing and certification

of cocaine). *See also* 42 Pa. Cons. Stat. § 6108 (1978); *prior enactments:* 28 Pa. Stat. §§ 91a, 91b, and 91d (1939); 28 Pa. Stat. § 63 (1897); 28 Pa. Stat. §§ 107 to 109 (1883).

Over a century ago, much closer in time to the adoption of the Constitution, the Massachusetts Supreme Judicial Court answered a similar challenge to the admissibility of such certificates without the testimony of the assayist or chemist who conducted the test in the negative. *Commonwealth v. Stoler*, 156 N.E. 71, 72-73 (Mass. 1927) (certificates of alcohol content admissible without testimony of assayer or chemist in prosecution for keeping and exposing for sale of alcohol; noting prior cases had all made use of state assayer or his assistant as a witness). Similarly, the Supreme Judicial Court decided several years prior to *Stoler* that the statute permitting the admission of the certificates without a live witness did not violate the confrontation clause. *Commonwealth v. Slavski*, 140 N.E. 465 (Mass. 1923). The *Slavski* court rightly viewed the certificates as public records of the nature permitted in evidence at the time the Constitution was adopted. *Id.* at 468-69. It is worth noting that Massachusetts jealously guards the confrontation rights of criminal defendants, and that the Declaration of Rights is careful to provide for a face to face confrontation with the accused in open court. Massachusetts Declaration of Rights, article 12. *See Commonwealth v. Amirault*, 677 N.E.2d 652, 660-64 (Mass. 1997). The certificates at issue in the present case, therefore, rightly fall under the general principles of the public records exception to the confrontation clause.

Perhaps more significantly, as a matter of common law, the use of public records as proof of

facts in criminal cases was well established at the time the Constitution was adopted. Indeed, the primary purpose for making and keeping these public records was to enforce property rights and to prosecute criminal cases. The *Slavski* Court was careful to enumerate quite extensively the variety and scope of the public records that were admissible after the adoption of the Constitution. *Slavski*, 140 N.E. at 468-69. The Respondent discusses, by way of analogy, coroner's reports. Br. of Resp't, pp. 57-59.

Another example of the application of the admissibility of public records in criminal prosecutions is the use of registries of marriage, which were admitted in a variety of cases, including adultery, bigamy, bastardy, and criminal conversation. The use of the public records has been reported and approved in many jurisdictions. See, e.g., *Williams v. State*, 54 Ala. 131, 134-36 (Ala. 1875) (reviewing Alabama law and noting that parole evidence and certificate of marriage both admissible as proof in criminal and civil cases); *State v. Potter*, 52 Vt. 33, 38-39 (Vt. 1879) (town clerk record of marriage admissible by statute, weight for the jury); *People v. Stokes*, 12 P. 71, 72 (Cal. 1886) (recorded marriage certificate admissible in adultery prosecution); *State v. Schwietzer*, 18 A. 787, 787-88 (Conn. 1889) (marriage certificate admissible in criminal failure to support prosecution); *State v. Behrman*, 19 S.E. 220, 222-23 (N.C. 1894) (authenticated copy of marriage certificate admissible in criminal prosecution); *Stark v. Johnson*, 95 P. 930, 931 (Colo. 1908) (certified copy of marriage register is admissible as direct evidence).

In fact, shortly after the ratification of the confrontation clauses of both the federal and

Massachusetts constitutions, the Massachusetts Supreme Judicial Court noted that a clergyman's record of marriage would be admissible in a criminal prosecution for lewd and lascivious association and cohabitation to prove the fact of marriage. *Commonwealth v. Littlejohn*, 15 Mass. 163 (1818). Shortly before, the Court had noted in a prosecution for adultery that the statutory requirement for recording marriages was intended to preserve evidence of the fact of marriage, but that the record was not sufficient to prove that the person married was the same as the person subsequently accused of adultery with another. *Commonwealth v. Norcross*, 9 Mass. 492, 493 (1813). Public records thus were admissible in criminal cases as proof of historical facts and the legal status of persons, but were not sufficient to prove that the accused was one and the same as the person named in the record. *See generally* THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PROCEEDINGS (Boston, Wells and Lilly 1826); ) 2 S. MARCH PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE § III (5th ed. 1822. A drug analysis certificate likewise records a historical observation of an event or fact, but does not make any assertion about the identity of the person who had possession of or used the substance at the time of the alleged crime. The certificate at bar merely states an empirical fact, and is useful only in conjunction with eyewitnesses, subject to confrontation, who can accuse the defendant as the person who possessed or controlled the substance tested.[21]

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[21] Furthermore, a police officer with sufficient experience may also offer his personal opinion that a particular ma-

An adverse ruling in this case will call into question the admissibility of these and other public records without live testimony. The right to cross-examination of the accuser is preserved in drug prosecutions today by the confrontation of the identifying police officers or other witnesses who must establish that the defendant at bar engaged in criminal conduct by possessing or using a controlled substance. The public record made and kept of the nature of the substance is admissible today, just as the records of marriage and similar facts have always been admissible in criminal prosecutions.

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terial is cocaine or some other controlled substance, while the defendant's identification will always remain an issue subject to testimony and cross-examination. *See Commonwealth v. Dawson*, 504 N.E.2d 1056, 1057-58 (Mass. 1987); *accord United States v. Harrell*, 737 F.2d 971, 978-79 (11th Cir. 1984); *United States v. Scott*, 725 F.2d 43, 45-46 (4th Cir. 1984); *United States v. Nolan*, 718 F.2d 589, 593-94 (3d Cir. 1983); *United States v. Clark*, 613 F.2d 391, 406 (2d Cir. 1979); *Howard v. State*, 496 P.2d 657, 660-61 (Alaska 1972); *Pettit v. Indiana*, 281 N.E.2d 807, 807 (Ind. 1972); *State v. Johnson*, 196 N.W.2d 717, 719 (Wis. 1972).

## CONCLUSION

For the foregoing reasons, as well as those stated in Respondent's brief, the decision of the Massachusetts Appeals Court should be affirmed.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

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IN THE

# Supreme Court Of The United States

LUIS E. MELENDEZ-DIAZ,

*Petitioner,*

v.

MASSACHUSETTS,

*Respondent.*

**On Writ of Certiorari to the Appeals Court of Massachusetts**

## BRIEF OF *AMICUS CURIAE* THE NATIONAL INNOCENCE NETWORK IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE* [1]

The Innocence Network (the Network) is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The forty-five current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, and Australia.[2] The Innocence Network and its members

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[1] Pursuant to Rule 37, a letter of consent from each party accompanies this filing. Pursuant to Rule 36, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

[2] The member organizations include the Alaska Innocence Project, Arizona Justice Project, Association in the Defence of the Wrongly Convicted (Canada), California & Hawai'i Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Griffith University Innocence Project (Australia), Idaho Innocence Project (Idaho, Montana, Eastern Washington), Indiana University School of Law Wrongful Convictions Component, Innocence Network UK, The Innocence Project, Innocence Project Arkansas, Innocence Project New Orleans (Louisiana and Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), Mississippi Innocence Project,

are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented. The Network pioneered the post-conviction DNA model that has to date exonerated over 200 innocent persons, and has served as counsel in the majority of these cases. As perhaps the Nation's leading authority on wrongful convictions, the Network and its founders, Barry Scheck and Peter Neufeld (both of whom are members of New York State's Commission on Forensic Science, charged with regulating state and local crime laboratories) are regularly consulted by officials at the state, local and federal levels.

In over half of the more than 200 exonerations by the Innocence Network, the misapplication of forensic disciplines—such as blood type testing, hair analysis, fingerprint analysis, bite mark analysis, and more—has played a role in convicting the

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Nebraska Innocence Project, New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Ohio Innocence Project, Pace Post Conviction Project (New York), Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University - Justice Brandeis Innocence Project (Massachusetts), Texas Center for Actual Innocence, Texas Innocence Network, The Reinvestigation Project of the NY Office of the Appellate Defender, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), and the Wisconsin Innocence Project.

innocent. In these cases, forensic criminalists presented fraudulent, exaggerated, or otherwise tainted evidence to the judge or jury which led to the wrongful conviction. *See, e.g., Innocence Project, Factors on Post-Conviction DNA Exonerations*, at http://innocenceproject.org/Content/351.php. This work has given *Amicus* a particularly strong interest in ensuring that criminal convictions are premised upon accurate forensic work -- an interest directly implicated by the constitutional question before the Court: whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).

## SUMMARY OF ARGUMENT

### A. The Myth of Infallible Forensic Evidence

Over the past 35 years, a belief has taken hold in the criminal justice system that critical elements of any given case can be conclusively and irrefutably resolved through the use of forensic evidence. This belief stems from the assumption that state forensic examiners are highly-trained scientists, who conduct widely-recognized tests, and can then provide an objective and unimpeachable report about their results for use in criminal trials. The supposedly objective and "neutral" nature of these reports render the need for direct testimony and cross-examination superfluous.

The Supreme Judicial Court of Massachusetts neatly captured this belief in its opinion rejecting a Confrontation Clause attack on the introduction of a chemical report of a forensic examiner into evidence over defense objection:

> Certificates of chemical analysis are neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test. . . .

*Commonwealth v. Verde*, reprinted at Appendix C to the Petitioner's Appendix to the Petition for Certiorari, at 17a.

Such a belief, however, rests entirely on a myth of infallibility -- a myth that finds no basis in the reality of state forensic practices throughout the country. In many cases, forensic examiners have little or no scientific background but are merely state law enforcement employees. To make matters worse, states like Massachusetts provide an easy means for unqualified examiners to escape detection by permitting judicial notice of an examiner's credentials without any demonstrated basis for doing so.[3]

Nor is there any merit to the notion relied on by the court below -- that forensic examiner reports and testimony should be exempt from confrontation because the examiners are doing nothing more than "stating" the objective results of "well-recognized" scientific tests. In reality, state forensic examiners do exercise substantial discretion and judgment regardless of the nature of the technique, and these examiners also often interpret the results of

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[3] Mass. Gen. Laws ch. 111, § 13 (when analyst certificate provided by statute is properly executed, "the court shall take judicial notice of the signature of the analyst or assistant analyst, and of the fact that he is such.")

unverified techniques for which there often exists no recognized or objective standard at all. In fact, many laboratories, including the one that performed the testing in this case, are not even accredited, Pet. Op. Br. at 27, and there is no governing body that oversees the quality of their work on any regular basis. Nor is accreditation a guarantee of reliable results. Many of the errors discussed in this brief occurred in accredited labs.

Undoubtedly, there are many cases in which qualified forensic examiners are careful and conservative in their work, exercise appropriate professional discretion and judgment, and thus provide sound and helpful scientific opinions. Unfortunately, however, there are also many documented cases in which state forensic examiners have relied on unscientific methods and procedures, have made mistakes in recording or reporting any results, have evinced bias in favor of the prosecution by overstating the probative value of test results, and have even fabricated test results entirely. In short, there is simply no basis to the idea that, as a result of the "scientific" label that the State places upon the opinion of the state examiner, forensic testimony is somehow "neutral" or ministerial and therefore unimpeachable.

Thus, even if all forensic examiners operated under ideal "scientific" circumstances -- solid techniques performed by qualified professionals, conducted in an accredited laboratory with meaningful supervision and controls -- their reports would still be subject to the same dangers that prompted the Framers to adopt the Confrontation Clause in the first place. This is because, at bottom, the evidentiary worth of forensic evidence cannot be

boiled down to a simple mathematical calculus. Instead, the probative value of forensic evidence always depends on a variety of factors, including the training and skill of the forensic examiner, the validity and reliability of the technique, the precision of the recording methods, the existence of supervisory controls, and the absence of context and confirmation bias undermining the accuracy and objectivity of the forensic examiner in reporting the results.

These sorts of factors are, on a fundamental level, no different than the problems that can affect the reliability of other types of testimony. All witnesses, including state forensic examiners, can make mistakes, shade their testimony in favor of the sponsoring party, and even fabricate things that never occurred. As the Framers recognized, these dangers are at their greatest when evidence is prepared by the state with an eye toward a criminal trial, as forensic examiner reports inevitably are, and as the reports in these case in fact were. The Confrontation Clause exists precisely to mitigate and combat these sorts of dangers.

### B. The Myth Exposed: The NYPD Crime Lab Scandal

One recent example from New York illustrates the potential dangers inherent in the notion that the reports of forensic chemists testing for the presence of narcotics -- like those admitted without the confrontation opportunity here -- involve merely the ministerial reporting of a "well-recognized" scientific test result.[4] In 2002, a chemist at the New York City

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[4] A full discussion of this incident in the New York laboratory can be found at Office of the Inspector General,

Police Department (NYPD) Controlled Substances Analysis Section stated during a staff meeting that "half the lab" cut corners when asked to determine the presence of narcotics. In response, lab supervisors administered an integrity test to three suspected chemists. The startling results revealed that two of the chemists fabricated findings in reports, claiming the presence of cocaine in packages which in fact contained innocuous white powder. Despite the fact that the NYPD documented "drylabbing" (the unethical practice of issuing a report of experimental findings without bothering to conduct the necessary experiment) by chemists routinely handling drug testing for the criminal justice system, no attempt was made to determine the extent to which actual casework was compromised. Nor was the misconduct reported by the lab's management outside of the Department, as required, to the Laboratory Accreditation Board of the American Society of Crime Laboratory Directors (ASCLD/LAB) and to the New York Commission on Forensic Science. Upon learning of the misconduct and cover-up several years later, the New York State Inspector General launched an investigation that led to a number of troubling findings.

Among these findings in the 2007 report, the Inspector General discovered that examiners failed to adequately investigate allegations of lab irregularities in a timely manner. Specifically, the Inspector General found that examiners allowed

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State of New York, *Investigation of Drug Test Irregularities at the NYPD Forensic Laboratory in 2002* (Dec. 2007), http://www.ig.state.ny.us/pdfs/Investigation%20of%20Drug%20Test%20Irregularities%20at%20the%20NYPD%20Forensic%20Laboratory%20in%202002.pdf.

analysts who had failed proficiency tests to continue casework, in violation of the lab's own internal rules. The lab's required report to accrediting bodies omitted any mention of the irregularities. Moreover, the Inspector General also found that the lab could not provide complete assurances that no incorrect test results were issued by the analysts in actual casework.

In short, the Inspector General found serious, systemic deficiencies of practice and judgment within the controlled substance analysis unit of one of the largest government forensic laboratories in the country.

### C. DNA Exonerations and Systemic Reviews Have Revealed Widespread Problems with Forensic Evidence that Only Confrontation Can Mitigate

As we demonstrate below, problems such as those exposed at the NYPD crime lab are merely illustrative of the many widespread failures of forensic evidence throughout the country. While these failures have long been well-recognized, their pervasive nature has recently been confirmed by the more than 200 DNA exonerations that have occurred in the past decade. In fact, of these 200-plus DNA exonerations, more than half involved forensic errors in the original trial -- errors that ranged from simple mistakes to exaggeration and overreaching, to the reliance on faulty pseudo-science, to outright fabrication.[5] In turn, these errors have prompted systemic reviews, which have established that

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[5] *See, e.g., Innocence Project, Factors on Post-Conviction DNA Exonerations*, http://innocenceproject.org/Content/351.php.

problems with forensic practices in state laboratories extend well beyond the DNA exoneration context.

Against this backdrop, it is critical that this Court preserve the most important protection provided to us by the Framers for ferreting out mistakes, overreaching, bias and falsehoods contained in testimonial evidence gathered by state officials in connection with a criminal prosecution -- the requirement that the accused have the opportunity to subject such evidence to the rigors of confrontation. While confrontation alone will not always prevent or expose faulty forensic evidence, it remains the best mechanism yet devised for doing so. Preserving the traditional opportunity of the accused to be confronted with the testimony contained in state forensic laboratory reports -- testimony to which factfinders often accord the greatest weight -- is vital to deterring and exposing bad forensic evidence, and thus ensuring that the confrontation right continues to serve the historic role envisioned by the Framers.

## ARGUMENT

The trials of the wrongly convicted have revealed widespread problems with forensic evidence, ranging from simple mistakes, to the exaggeration of forensic results by state examiners, to the uncritical reliance by state examiners on forensic procedures that had never stood up to real scientific scrutiny, to some instances of outright fabrication. In many ways, this is unsurprising. No forensic laboratory or discipline has been entirely shielded from error.

Indeed, the FBI forensic laboratory, considered the pre-eminent crime lab in the country, has been repeatedly criticized for scientifically flawed

procedures and overstated testimony.[6] The Inspector General released two reports on procedural problems at the FBI lab, with one report in 1997 documenting misconduct in the explosives unit[7] and another report in 2004 detailing flawed procedures and falsified testimony by a technician in the DNA unit even after the lab had become accredited.[8] In 2002, the FBI forensic lab asked the National Academy of Sciences to conduct an independent review of its comparative bullet lead analysis. The resulting investigation by the Academy's National Research Council called into question 30 years of FBI testimony on bullet evidence in criminal cases. Their report found that the FBI's methodology for interpreting results was deeply flawed and that courtroom testimony claiming bullet fragments could be matched to a particular box of ammunition was so overstated that it was misleading under the rules of evidence.[9]

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[6] *See* Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, Social Science Research Network 195 (Jan. 2008), *available at* http://ssrn.com/abstract=1083735.

[7] U.S. Department of Justice, Office of the Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (Apr. 1997), *available at* http://www.usdoj.gov/oig/special/9704a/.

[8] Office of the Inspector General, U.S. Department of Justice, *The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities* (May 2004), *available at* http://www.usdoj.gov/oig/special/0405/final.pdf.

[9] The Washington Post, 60 Minutes, & Innocence Project Joint Investigation, *Evidence of Injustice, FBI's Bullet Lead Analysis Used Flawed Science To Convict Hundreds Of Defendants* (Nov. 18, 2007), *available at* http://www.cbsnews.com/stories/2007/11/16/60minutes/main3512453.shtml. The FBI and the Innocence Project are now engaged

The fact that even the FBI could routinely present such flawed forensic evidence for such a lengthy period demonstrates the danger in a rule that would routinely shield the reports of state forensic examiners from the crucible of adversary testing set forth in *Crawford*. Those risks are real, as the wrongful conviction cases and the resulting systemic reviews demonstrate.

### A. The Trials of the Wrongly Convicted Reveal a Widespread Pattern of Forensic Errors

The trials of the wrongly convicted reveal a widespread pattern of forensic errors. Although some of these errors involve forensic practices that have given way to new testing methods, there is no reason to believe these errors are purely or even largely a function of technology. As the Framers recognized more than 200 years ago when they included the Confrontation Clause in the Bill of Rights, simple mistakes and even more culpable ones are likely to continue regardless of how much technological progress occurs. Indeed, in the sections below, we provide several examples in which mistakes in the presentation of even DNA evidence have generated a wrongful conviction. As those cases show, technological advances cannot eliminate the forensic errors that have plagued the exoneration cases, and these errors highlight the need for the sort of vigorous confrontation right this Court has described in its *Crawford* line of cases.

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in a co-operative effort to notify prosecutors and defendants about unreliable analyst testimony going back to 1972.

### 1. Pre-DNA Serology Evidence – Chronic Mistakes and Overreaching

Before the advent of DNA technology, serology evidence was widely used in rape and homicide cases. Although by contemporary DNA standards, conventional serology is not terribly discriminating, in the pre-DNA era, serologists conducted blood grouping tests which could either exclude a suspect as the source of blood, semen or saliva left at a crime scene or include the suspect in a subset of the population that could have deposited the biological evidence. When used to include a suspect in the donor population, the size of the donor population became the key issue.[10] Regrettably, the exoneration cases contain many instances of forensic examiners who, in laboratory reports or through their trial testimony, understated the size of the donor population and thus overstated the probative value of the evidence.[11]

Most often examiners claimed the perpetrator was part of some relatively small subset of the population that included the defendant, when in fact no part of the population could be excluded on the basis of serology.[12] In those cases, despite the fact

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[10] *See* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 81-85 (2008); National Research Council, DNA Technology in Forensic Science 158 (1992).

[11] Garrett, *Judging Innocence*, 108 Colum. L. Rev. at 81-82 (discussing role of bad serology evidence in wrongful conviction cases).

[12] This occurred in 35 of the exoneration trials reviewed in connection with a forthcoming article on the trials of the wrongly convicted. See Brandon L. Garrett and Peter J. Neufeld, Improper Forensic Science and Wrongful Convictions, 95 Va. L. Rev. __ (forthcoming 2009), copy on file with the authors ("Garrett and Neufeld").

that the serology test results had no probative value, the examiners incorrectly reported that the testing was inculpatory. In still additional cases, the serology *excluded* the defendant, but analysts falsely asserted that the results were non-probative or could somehow nevertheless include the defendant.[13]

What these examples have in common is that in each, the analyst misled the factfinder by misstating the probative value of the evidence. In some cases the evidence was less inculpatory than represented but in most of the cases, evidence that was either neutral or exculpatory was misrepresented as inculpatory. Confrontation can be used to address precisely these sorts of problems: flagging and locking in limitations in the testing not otherwise acknowledged by the examiner, exposing any over-statements by the examiner concerning the probative value of serological evidence, and highlighting any exculpatory results omitted from the report or direct testimony. In short, confrontation can be a vital antidote to the problems illustrated by the serology cases.

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[13] In the Garrett & Neufeld article, this type of false assertion is documented in six post-conviction DNA exonerations. For instance, in the case of exoneree Jerry Watkins in 1986, the serology revealed that type B blood group substances were present in the vaginal swab although neither the victim nor Watkins possessed a B blood group substance. Nevertheless, the examiner asserted that Mr. Watkins was not excluded by simply making up an explanation for the presence of the B. DNA testing exonerated Mr. Watkins in 2000. *Watkins v. Miller*, 92 F. Supp. 2d 824 (S.D. Ind. 2000); *see generally* Innocence Project, *Know The Cases, Jerry Watkins*, available at http://www.innocenceproject.org/Content/286.php.

## 2. Hair Comparison Analysis – Bad Science and Overreaching.

Another danger revealed by the exoneration cases is that simply labeling certain evidence "scientific" can induce fact-finders to overlook the unreliability of the technique, the examiner, or both. This sort of assumption has been a recurrent problem in the exoneration cases involving the microscopic comparison of hairs. Over fifty of the DNA exoneration cases involved such analysis, in which an examiner, using a microscope, compared hairs found at the crime scene with the Defendant's hair and then provided the factfinder with a misleading conclusion concerning the probative value of the comparison.[14]

In a criminal trial, the probative value of this comparison should be quite limited. As the FBI noted in its 1984 Handbook, microscopic hair examination is "[n]ot positive evidence."[15] No adequate empirical data exist regarding the frequency of microscopic characteristics of human hairs and, consequently, the field has adopted standards that the strongest statement of association that can be made by an analyst is that the hairs in question are "consistent" with the defendant's or "could have" come from the defendant.[16] But the term "consistent" does not provide a sense of how rare or common the consistency is. Nonetheless, many analysts went far

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[14] Garrett & Neufeld, (statistics based on full review of trial transcripts in exoneration cases).

[15] Federal Bureau of Investigation, Handbook of Forensic Sciences 37 (March 1984).

[16] Proceedings of the International Symposium on Forensic Hair Comparisons, 107-110 (1985).

beyond this limitation, stating in reports and testimony that a crime scene hair was "highly likely" or "very probably" to have come, or did come, from the defendant.[17] Analysts also simply fabricated numerical proabilities where none existed.[18] Use of unsupported probability, frequency, or other individualizing statements is contrary to science and highly misleading. Yet, the trials of the wrongly convicted reveal it to be disturbingly common. Confrontation can prove a critical tool both in exposing the limited probative value of such pseudo-scientific techniques generally, and in deterring and exposing exaggerated claims about the meaning of such forensic testing in particular.

### 3. Drylabbing – A Chronic Failing Coins a Term For Forensic Fabrication.

Another problem uncovered by the DNA exonerations involved complete fabrication of forensic results.[19] The problem has even been given a name -- "drylabbing" -- which occurs when the state examiner

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[17] Garrett & Neufeld; *Montana v. Jimmy Ray Bromgard*, (on file with authors).

[18] In the trial of Jimmy Ray Bromgard, for example, the examiner testified that he had determined that head and pubic hairs found on the victim's bedding was "indistinguishable" from Mr. Bromgard's hair samples and there was only a one in ten thousand chance that the hairs came from anyone other than Mr. Bromgard, despite the fact that there was no database. Garret & Neufeld; Trial Transcript at 231, *available at* http://www.innocenceproject.org/docs/Bromgard_Melnikoff_Testimony.pdf.

[19] *See* Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 Va. J. Soc. Pol'y & L. 439 (Winter 1997).

"reports" results of tests that were never in fact conducted. This was the problem discussed above in connection with the NYPD Controlled Substances Analysis Division -- but it was in no way limited to that division.

Drylabbing was also documented in the investigation into the Houston crime laboratory that arose in the wake of exonerations there,[20] and in the investigation that followed an exoneration in West Virginia.[21] Drylabbing in drug cases has also been documented in San Francisco, where a crime lab technician certified evidence as illicit narcotics without performing the required chemical tests.[22] In Dallas, Texas, police arrested 39 Hispanic immigrants on the basis of evidence that was

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[20] *See* Michael R. Bromwich, *Third Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room* at 31-36 (June 30, 2005), http://www.hpdlabinvestigation.org/reports/050630report.pdf; *see* Michael R. Bromwich, *Fifth Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room*, 66-67 (May 11, 2006), http://www.hpdlabinvestigation.org/reports/060511report.pdf. (documenting "pervasive and serious problems with the quality of scientific work performed by the serologists, as well as with the presentation of the results obtained"); *see also* Roma Khanna & Steve McVicker, *Fingers Pointed at HPD Crime Lab in Death Row Case*, Houston Chronicle, Apr. 24, 2003, at A1.

[21] *See In re Investigation of W. Va. State Police Crime Lab*, 438 S.E.2d 501, 511-13 (W. Va. 1993).

[22] *See* Jim Herron Zamora, *Lab Scandal Jeopardizes Integrity of S.F. Justice: Sting Uncovered Bogus Certification*, San Francisco Examiner, Sept. 16, 1994, at A7.

allegedly "field-tested" and found to be cocaine, but actually consisted of wallboard gypsum.[23]

The fact that these sorts of forensic practices exist stands as a glaring example of the sort of failing that confrontation is designed to prevent and expose; examiners who realize there is a possibility their work -- or lack thereof -- will be subjected to adversarial scrutiny can be expected to think twice before making up results and tests from scratch.

### 4. Individual Examples of Forensic Errors Infecting the Wrongful Conviction Cases

A closer look at selected individual exoneration cases illustrates how the forensic mistakes, overreaching and bias outlined in the preceding sections directly led to wrongful convictions.

The prosecution of exoneree Earl Washington, for example, highlights some of the problems with serology evidence.[24] In Mr. Washington's case, the victim was a Caucasian woman who stated before she died that her attacker was African-American. A forensic report by state examiners found that stains on a central piece of evidence, a blue blanket on the murdered victim's bed, contained a fairly uncommon

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[23] *See* Mark Harrison, *Dallas Police Frame and Deport Hispanics*, November Coalition (Spring 2002) available at http://www.november.org/razorwire/rzold/27/page03.html

[24] Mr. Washington was exonerated in 2000 by DNA testing ordered by then-Governor James Gilmore. Governor Gilmore gave Mr. Washington a full and unconditional pardon for the murder. For more information about Mr. Washington's case, *see* http://www.innocenceproject.org/Content/282.php. *See also* Trial transcript available at www.innocenceproject.org/docs/Earl_Washington.pdf

plasma protein, "Tf CD."[25] This protein was virtually unheard of in Caucasians but found somewhat more frequently in the blood of African-Americans (approximately 10% of the population) -- which meant that it had been left by the attacker and not the victim. Initial laboratory reports flatly recognized this point, but after Mr. Washington became a suspect, and after it was determined that he did not possess the unusual "Tf CD" characteristic, forensic examiners prepared a new report stating instead that "[t]he results of Tf typing were inconclusive."[26]

Microscopic hair comparison testimony played a critical role in the capital murder trial of Ronald Williamson in Oklahoma. A state forensic examiner had concluded that two hairs found in the victim's apartment were consistent with Williamson's scalp hairs and two hairs found on the victim's bed were consistent with Williamson's pubic hairs.[27] Based in large part on this testimony, a jury convicted Mr. Williamson of capital murder. After an Oklahoma federal court overturned the conviction on habeas review, DNA testing exonerated Williamson and incriminated the prosecution's star witness -- precisely the opposite of the prosecution-friendly

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[25] Certificate of Analysis, Virginia Bureau of Forensic Science, August 19, 1982, available at www.innocenceproject.org/docs/Earl_Washington.pdf. at 5.

[26] See May 23, 1983 test results and Amended Copy of Certificate of Analysis dated August 19, 1982, August 26, 1983, available at [26] Certificate of Analysis, Virginia Bureau of Forensic Science, August 19, 1982, available at www.innocenceproject.org/docs/Earl_Washington.pdf. at 13-14.

[27] *Williamson v. Oklahoma*, 812 P.2d 384, 399, 404 (Okla. Crim. App. 1991).

conclusions definitively reached by the state forensic examiner.[28]

The case of Gilbert Alejandro, wrongly convicted of aggravated sexual assault in Texas, provides a classic example of drylabbing. There, the state forensic examiner claimed a DNA match even though neither he nor anyone else had completed any DNA testing at the time of the trial.[29] Final DNA testing, completed after Mr. Alejandro had served four years in prison, excluded Alejandro as the culprit.[30]

The case of Jeremiah Sutton[31] also confirms that problems with forensic evidence have persisted into the DNA era. Mr. Sutton's conviction rested almost entirely on the basis of DNA tests performed by the Houston Police Crime Laboratory, which had been summarized in an official report. The report failed to include information contained in the raw data and the analyst's bench notes, which in fact excluded Sutton as the culprit. Instead, the report erroneously concluded that the DNA profile found at the crime scene was consistent with a mixture from Sutton, the victim and another man. The report then compounded the error by making a series of incorrect

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28 *See 2 Men Go Free -- Thanks to DNA Evidence*, Orlando Sentinel, Apr. 16, 1999, at A16.

29 Brandon L. Garrett, *Judging Innocence*, 108 Columbia L. Rev. at 84.

30 Innocence Project, *Know the Cases: Gilbert Alejandro*, http://www.innocenceproject.org/Content/47.php.

31 Roma Khanna & Steve McVicker, *New DNA Test Casts Doubt on Man's Rape Conviction*, Houston Chronicle (Mar. 10, 2003), *available at* http://www.truthinjustice.org/sutton.htm. For a complete profile of the Sutton case, *see* http://www.innocenceproject.org/Content/268.php.

probability assertions about the frequency with which these purported events could occur.[32] In short, the DNA laboratory report in Mr. Sutton's case contained many errors not apparent from the face of the report, and all of which overstated the strength of the evidence implicating Mr. Sutton in the offense.

These are just some of the many exoneration cases that illustrate how forensic laboratory errors and overreaching plagued the criminal justice process during the past 35 years. Given that such mistakes, omissions and overreaching are precisely the sorts of errors confrontation is designed to deter and expose, exempting forensic evidence from the rigors of confrontation would only exacerbate these problems.

### B. Systemic Reviews Triggered By The DNA Exonerations Have Confirmed Pervasive Forensic Errors and Misleading Forensic Reports

DNA exonerations are possible only in a small subset of cases -- those in which DNA testing can identify the source of biological evidence left by a rapist, which is usually dispositive of guilt in cases involving stranger-perpetrators where identity is the central issue. Once it became clear that a substantial number of forensic errors were occurring in this small subset of cases, many state and local jurisdictions around the country began systemic reviews of their own forensic practices and laboratories to determine whether the problem was more widespread. These reviews have revealed that the problems of erroneous

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[32]Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. at 84, n.109.

forensic reports and testimony extend well beyond the exoneration context.

**Boston, Massachusetts**: The case currently before the Court arises out of an incident in Boston, which was investigated by the Boston Police Department (BPD). The forensic work of the BPD has itself been the subject of scrutiny in the wake of the DNA exoneration of Stephan Cowans. At Mr. Cowans' trial, two BPD Fingerprint examiners misidentified a crucial fingerprint. After the exoneration, Boston Police Commissioner Kathleen M. O'Toole ordered an audit of the fingerprint unit. An independent auditor issued a "blistering critique" of the unit, following which, Commissioner O'Toole immediately shut it down.[33] A later investigation by journalists uncovered information suggesting that the BPD fingerprint unit had been a "dumping ground" for misfit officers for decades.[34] The Massachusetts State Police (one of only sixteen state agencies nationwide that at the time remained uncertified) took over Boston's fingerprinting lab in an effort to upgrade the quality of work.[35] It is unclear whether this actually solved the problem, as the Massachusetts State Police Crime Labs have themselves been the subject of substantial criticism,

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33 Suzanne Smalley, *Police Shutter Print Unit: Identification Error, Critical Report Cited*, Boston Globe, October 14, 2004, at B1. Ralph Ranalli, *Reilly Won't Charge Two Police Anaylsts*, Boston Globe, June 24, 2004, at B1.

34 Maggie Mulvihill & Franci Richardson, *Misfits Dumped into Cop ID Unit*, Boston Herald, May 6, 2004.

35 Suzanne Smalley, *State Police to Process Boston Prints, Scathing Review Prompts Shift*, Boston Globe, Oct. 16, 2004, at B3.

based on mishandling of evidence and other substandard practices.[36]

**Montana**: The DNA exoneration of Jimmy Ray Bromgard revealed that the founder and Director of the Montana State Crime Laboratory had made up a non-existent database and then fabricated statistics and probabilities to mislead the prosecutor and jury into according much more weight to the hair evidence then was either valid or appropriate. Mr. Bromgard's DNA exoneration prompted the creation of an independent review panel, which concluded that the examiner's work contained faulty and invented statistical analysis. Further investigation revealed that he had fabricated statistical evidence in two other cases. Post conviction DNA testing in those two cases resulted in two more exonerations. [37] Before his shoddy work was exposed in Montana, the same forensic analyst moved to Washington to conduct drug analysis work, similar to the drug analysis work before the Court here.[38] When his past became known, an internal review by the state of Washington

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36 Jonathan Saltzman & John R. Ellement, *Crime Lab Mishandled DNA Results, State Police Suspend Aide, Ask For FBI Audit*, Boston Globe, Jan, 13, 2007; Jose Martinez, *Bay State Crime Labs in Dire Straits, Report: State Crime Labs Underfunded, Overworked*, Boston Herald, Apr. 15, 2002, at 1.

37 *See* Innocence Project, *PEER REVIEW REPORT: Montana* v. *Jimmy Ray Bromgard*, *available at* http://www.innocenceproject.org/docs/bromgard_print_version1.html; Adam Liptak, *2 States to Review Lab Work of Expert Who Erred On ID*, N.Y. Times, Dec. 19, 2002 at A24.

38 Ruth Teichroeb, *Counties to Be Told of Crime Lab Flaws*, Seattle Post-Intelligencer, Mar. 17, 2004, *available at* http://seattlepi.nwsource.com/local/165129_crimelab17.html.

of his drug analysis work revealed additional methodology problems. The reviewer described the forensic work as "sloppy" and "built around speed and shortcuts."[39]

**Houston, Texas:** A series of DNA exonerations triggered a full-scale review of the Houston Police Department Crime Laboratory. The results of that review were troubling, uncovering a "massive number of very serious analytical and reporting problems" in serology cases and major errors in DNA and controlled substances cases.[40] The review of over 1,000 serology cases processed by the Crime Lab during the 1980s and early 1990s found that the lab committed errors in virtually every serology case and exhibited a "nearly ubiquitous failure to apply and to properly interpret critical controls."[41] The report also documented serious analytical and interpretive failings in the DNA unit, ultimately concluding that the Lab produced "highly questionable" results rife with inaccurate and misleading statistics.[42] Among the types of problems found were an untrained staff that used shoddy forensic practices, including poor calibration and maintenance of equipment, improper record keeping, a lack of safeguards against contamination, and a leaky roof which flooded boxes of biological evidence.[43] In addition, several

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[39] *Id.*

[40] Michael R. Bromwich, *Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room* at 36, 4-5 (June 13, 2007),

[41] *Id.* at 37.

[42] *Id.* at 5.

[43] *Quality Assurance Audit of Houston Police Dep't Crime Laboratory – DNA/Serology Section* (Dec. 12-13, 2002),

instances of "drylabbing" – that is, the fabrication of results – were documented in the controlled substances division.[44]

Despite these serious methodological problems, however, the Crime Lab continued to perform DNA work for a decade "under conditions that made the risk of an injustice intolerably high."[45] According to one Texas state senator, "the validity of almost any case that has relied upon evidence produced by the lab is questionable."[46]

**West Virginia:** After the DNA exoneration of Glen Dale Woodall, the Prosecuting Attorney for Kanawha County requested a judicial investigation into the work of the serology department at the West Virginia Department of Public Safety; a separate investigation was also conducted by the American Society of Crime Laboratory Directors (ASCLD).[47] Both the West Virginia Supreme Court and ASCLD found that the serologist involved in the Woodall case routinely overstated results, provided misleading statements about his results, failed to report exculpatory results, failed to follow-up on conflicting results, and reported scientifically impossible or

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*available at* http://www.pdsdc.org/resources/dna/QA_Audit_for_DNA_databasing_labs.pdf.

[44] *See* Michael R. Bromwich, *Third Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room* at 31-36 (June 30, 2005), http://www.hpdlabinvestigation.org/reports/050630report.pdf.

[45] *Id.* at 5.

[46] Rodney Ellis, Editorial, *Want Tough on Crime? Start by Fixing HPD Lab*, Houston Chronicle, Sept. 5, 2004.

[47] *See In re Investigation of W. Va. State Police Crime Lab*, 438 S.E.2d 501, 503 (W. Va. 1993).

improbable results. They also found evidence that the serologist's supervisors ignored or concealed complaints about his work. Both concluded that laboratory operating procedures -- which, among other things, did not require written documentation of methodology, lacked auditing requirements, lacked written protocols, and failed to follow accepted scientific protocols -- "undoubtedly contributed to an environment within which [the serologist's] misconduct escaped detection."[48]

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These are just some of the jurisdictions in which exonerations have prompted systemic reviews of forensic practices. Audits of forensic laboratories in California, Colorado, Illinois, Virginia, Vermont, Texas, Michigan, Rhode Island, and Washington have revealed similar problems.[49] The pervasive nature of these errors illustrates the dangers of any rule premised on the notion that the inherent reliability of forensic evidence somehow renders unnecessary the added burden on law enforcement entailed by the right to confrontation as described by this Court in *Crawford*. Indeed, at a time when the American Bar Association has issued a set of reform principles to govern the use of forensic evidence,[50] and Congress

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[48] *Id.* at 504.

[49] Craig M. Cooley, *Forensic Science and Capital Punishment Reform*, 17 Geo. Mason U. Civ. Rts. L.J. 299, 317-18 (Spring 2007).

[50] Andrew E. Taslitz, *Convicting the Guilty, Acquitting the Innocent: The ABA Takes a Stand*, Crim. Just., at 27 (Winter 2005).

has tasked the National Academy of Sciences with examining ways to improve the quality of forensic practices,[51] it would be regrettable if this Court were to cut back on the most important protection against errors and flaws in the evidence gathered by the State for use in a criminal prosecution. Indeed, the Court's approval of a regime in which state forensic evidence is exempted from the crucible of adversary testing would undermine reform efforts by substantially reducing the likelihood that sub-standard forensic practices would be eventually exposed in the courtroom.

### C. The Confrontation Guarantee Provides a Vital Safeguard For Exposing, During The Criminal Trial Itself, The Sorts Of Widespread Forensic Errors Revealed By The DNA Exonerations And Their Aftermath

By demonstrating the propensity of state forensic evidence for mistakes, and the susceptibility of that evidence to bias and fabrication, the DNA exonerations and resulting systemic reviews highlight the importance of preserving the ancient procedural safeguard of confrontation that the Framers included in the Bill of Rights. Confrontation

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51 *See Identifying the Needs of the Forensic Sciences Community*, http://www8.nationalacademies.org/cp/projectview.aspx?key=48741. That Committee asked Peter Neufeld, Co-Director of the Innocence Project, and Professor Brandon Garrett of the University of Virginia to examine, for the first time, the incidence of improper forensic science testimony in trials of persons exonerated by post-conviction DNA testing. Many of those results appear in this brief.

is the best mechanism yet devised for safeguarding against precisely the sorts of witness mistakes, overreaching, bias and outright fabrication exposed by the exonerations and their aftermath. Indeed, these are precisely the sorts of errors most likely to occur when, as often occurred during the *Ohio v. Roberts*[52] era, the state's testimonial evidence is shielded from the opportunity for adversarial scrutiny. *E.g.*, *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (importance of confrontation in exposing falsehood); *Delaware v. Van Arsdall*, 475 U.S. 673, 682-83 (1986) (importance of confrontation in exposing bias); *see generally Crawford v. Washington*, 541 U.S. 36, 61-62 (2004) (describing confrontation as "procedural" guarantee that reflects Framers' substantive judgment about "how reliability can best be determined.").

The confrontation right described in *Crawford* can play a vital role in deterring and exposing the sorts of errors described in the previous sections. Affording such a right provides the defense with strong incentives to identify and correct simple mistakes in examiner conclusions, to push back against testimony that overstates the probative value of the results, and to probe and explore conclusions to ensure they have some grounding in validated procedures actually performed in connection with the case. The possibility that this will occur in any given case also provides significant incentives for forensic examiners to be careful and conservative in their practices and testimony.

It is also important to recognize that when vigorous confrontation dismantles misapplied or

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[52] 448 U.S. 56 (1980).

erroneous forensic evidence -- as it can -- the resulting acquittal often escapes further notice. Thus, there are undoubtedly many more examples of how confrontation can effectively police poor forensic work than appear in the reported decisions.

Nonetheless, examples exist. The cross-examination of a police chemist in a Baltimore County, Maryland case provides a textbook illustration of how confrontation in the forensic context can prevent or expose the sort of bad forensic work discussed above.[53] On cross-examination in a murder case brought by the State of Maryland against Robert Bedford, the chemist there acknowledged in a pre-trial hearing that "she did not understand the science behind many of the tests that she performed," and "she did not perform a number of standard tests on the blood samples in the case."[54] She also "agreed that other tests she had completed were useless" and "acknowledged that she had failed to record the results of some testing steps needed to ensure accuracy in blood typing."[55] Finally, she acknowledged at the conclusion of cross that, "as a result of all this" "there [wa]s not one finding, one

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[53] Indeed, the chemist discussed above also tested blood evidence in DNA-exoneree Bernard Webster's case and provided testimony in that case. Stephanie Hanes, *Chemist Quit Crime Lab Job After Hearing, Papers Show; She Acknowledged Report Was Worthless In 1987*, Balt. Sun, Mar. 19, 2003, at B1. After the exoneration, scientist Edward T. Blake reviewed the chemist's explanations about blood typing "within the definition of material perjury." *Id.* In response, the Baltimore County Police Department began reviewing all 480 cases in which the chemist had performed or supervised serological tests. *Id.*

[54] *Id.*

[55] *Id.*

result in this report that [wa]s usable" and that her "entire report . . . [her] entire analysis [wa]s absolutely worthless."[56] As a result of this confrontation at the pre-trial hearing, the prosecutors decided not to call the forensic examiner at trial. When asked why by reporters, the prosecutor responded: "Have you read the transcripts? Well, there you go."[57]

Cross-examination had similarly beneficial results in *Ragland v. Kentucky*, 191 S.W.3d 569, 581 (Ky. 2006), where an FBI bullet lead composition analyst was caught in a lie by defense counsel on cross-examination, confronted with her earlier statements, and eventually forced to admit that her prior statements were false. Later, the analyst admitted, "[i]t was *only after the cross-examination at trial* that I knew I had to address the consequences of my actions." *Id.* (emphasis added).

It would be a mistake, however, to say that confrontation is a *foolproof* method of ferreting out these errors. Regrettably, many of the exoneration cases were ones in which the adversarial system, including actual confrontation of the state forensic examiner, failed to elicit the truth -- that the defendant was in fact innocent of the charged offense.

Even though confrontation cannot prevent every wrongful conviction in which forensic testimony is presented, however, it still has performed a critical role in minimizing such errors and helping to rectify them when they do occur. Many of the errors discussed above would never have been discernable

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[56] *Id.*

[57] *Id.*

from state forensic examiner reports alone. In fact, in many of these cases, it was confrontation that allowed those conducting post-conviction review to ascertain both that an error was likely made and, after DNA established that a wrongful conviction had occurred, what the causes of that error were. In other words, while confrontation did not prevent a wrongful conviction in the cases discussed above, in many cases it hastened the DNA exoneration by flagging the case as one where error was likely.

For example, in the case of Hector Gonzalez, who was wrongly convicted of a murder in Brooklyn, the forensic examiner testified on direct examination that blood stains found on a pair of Mr. Gonzalez' jeans were "consistent with the victim's blood type" but failed to reveal what percentage of the population shared that blood type.[58] Only on cross-examination did the forensic examiner acknowledge that the genetic markers she was relying on for her direct examination testimony were found in 54% of the New York city population.[59]

Likewise, in the case of Dwayne Allen Dail, who spent 18 years in a North Carolina prison for a rape he did not commit, the forensic examiner was simply asked on direct examination whether she had found semen on the vaginal smears and the panties.[60] She

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58 Innocence Project, *Know the Cases*, Hector Gonzalez, http://www.innocenceproject.org/Content/155.php.

59 Trial transcript, available at www.innocenceproject.org/docs/GonzalezShenoudaTestimony.pdf.

60 Innocence Project, Know the Cases, Dwayne Allen Dail, http://www.innocenceproject.org/Content/832.php. Trial transcript available at www.innocenceproject.org/docs/Dail.pdf.

responded in the affirmative. Cross-examination, however, made clear that the semen had not been matched to Mr. Dail -- although the examiner stated simply that the sample could not "implicate or eliminate" Mr. Dail as a suspect. The record created by confrontation has accordingly helped to more easily identify where the forensic examiners went wrong, thereby assisting in securing the later DNA exoneration.

Of course, the point is to do even better -- the goal of Confrontation is to produce the correct result at trial by "beat[ing] and bolt[ing] out the Truth," *Crawford*, 541 U.S. at 62 (internal citation and quotation omitted). Good forensic practices have nothing to fear in such a system. Not only will such procedures and methods withstand even the most vigorous cross-examination, but the accused will often choose to forego confrontation entirely, rather than drive home in front of the fact-finder the accuracy and reliability of the scientific evidence against him. By contrast, bad forensic practices and pseudo-science have plenty to fear, as a re-invigorated opportunity for confrontation can only increase the likelihood that mistakes, overreaching and bias will be exposed at trial. In short, while no procedural mechanism could ever ferret out every bad practice and erroneous test result, applying the confrontation guarantee as described in *Crawford* to reports of state forensic examiners prepared in anticipation of a criminal prosecution will go a long way towards enhancing the truth-seeking function. As *Crawford* recognized, this is precisely what the Framers envisioned. *Crawford*, 541 U.S. at 61.

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The pervasive errors discussed above expose the folly of any argument that an opportunity to confront forensic testimony is a burdensome luxury for our criminal justice system. Time away from the laboratory and transportation to the courthouse are not the only costs implicated. As the DNA exonerations have shown, there are also real costs to a suspension of confrontation, including increased wrongful convictions, attendant civil suits, loss of public trust, and, in some cases, the failure to apprehend the true perpetrator. These costs were the ones that most concerned the Framers when they adopted the confrontation guarantee. As the Framers recognized, when it comes to the presentation of evidence compiled by law enforcement with an eye toward prosecution, a procedural mechanism that "beats and bolts out the truth" is a necessity no true system of justice can do without -- even when it comes to evidence labeled "scientific" by state officials.

## CONCLUSION

For the foregoing reasons, the decision of the Appeals Court of Massachusetts should be reversed.

Respectfully submitted,

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